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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 365

NOAH ADAIR, PETITIONER,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 24, 1937.

CERTIORARI GRANTED OCTOBER 18, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 4] **IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA**

DEBTORS PETITION IN PROCEEDINGS UNDER SECTION 75 OF THE BANKRUPTCY ACT—Filed August 6, 1936

To the Honorable Judges of the District Court of the United States for the Southern District of California, Central Division:

The petition of Andrea Cuccia, of R. 1, Etiwanda, California, in the County of San Bernardino, and District & State of California, respectfully represents:

That he is personally bona fide engaged primarily in the farming operations (or that the principal part of his income is derived from farming operations) as follows: vin-yard; that such farming operations occur in the County of San Bernardino, within said judicial district; that he is insolvent (or unable to meet his debts as they mature); and that he desires to effect a composition or extension of time to pay his debts under Section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A" and verified by your petitioner's oath, contains a full and true statement of all his debts and so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act.

[fol. 5] That the schedule hereto annexed, marked "B" and verified by your petitioner's oat-, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore your petitioner prays that his petition may be approved by the court and proceedings had in accordance with the provisions of said section.

Andrea Cuccia, Petitioner.

Duly sworn to by Andrea Cuccia. Jurat omitted in printing.

[fol. 6] SUMMARY OF DEBTS AND ASSETS

(From the Statements of the Bankrupt in Schedules A and B)

				Dollars	Cents
Schedule	A....	1 (1)	Taxes and Debts due United States.....	Nil	
"	A....	1 (2)	Taxes due States, Counties, Districts and Municipalities.....	Nil	
"	A....	1 (3)	Wages.....	250	.00
"	A....	1 (4)	Other Debts preferred by law.	Nil	
"	A....	2	Secured claims.....	12681	.15
"	A....	3	Unsecured claims.....	13350	.42
"	A....	4	Notes and bills which ought to be paid by other parties thereto.....	Nil	
"	A....	5	Accommodation paper Schedule A, total.....	Nil	
				26031	.57
Schedule	B....	1	Real Estate.....	22500	.00
"	B....	2-a	Cash on hand.....	Nil	
"	B....	2-b	Bills, promissory notes and securities.....	Nil	
"	B....	2-c	Stock in trade.....	Nil	
"	B....	2-d	Household goods, etc.....	1200	.00
"	B....	2-e	Books, prints and pictures...	Nil	
[fol. 7]					
"	B....	2-f	Horses, cows and other animals.....	100	.00
"	B....	2-g	Carriages and other vehicles..	10	.00
"	B....	2-h	Farming stock and implements.....	60	.00
"	B....	2-i	Shipping and shares in vessels.	Nil	
"	B....	2-k	Machinery, tools, etc.....	Nil	
"	B....	2-l	Patents, copyrights and trade marks.....	Nil	
"	B....	2-m	Other personal property.....	Nil	
"	B....	3-a	Debts due on open account..	Nil	
"	B....	3-b	Stocks, negotiable bonds, etc.	Nil	
"	B....	3-c	Policies of insurance.....	Nil	
"	B....	3-d	Unliquidated claims.....	Nil	
"	B....	3-e	Deposits of money in banks and elsewhere.....	Nil	
"	B....	4	Property in reversion, remainder, trust, etc.....	Nil	
"	B....	5	Property claimed to be exempt.....	1370	.00
"	B....	6	Books, deeds and papers....	Nil	
			Schedule B, total.....	25240	.00

Andrea Cuccia, Petitioner.

[fol. 8] [1]

Schedule A (2)

Creditors Holding Securities

(N. B.—Particulars of Securities held, with dates of sale, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the acts of Congress relating to Bankruptcy; and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

Reference to Ledger or Voucher.—Names of Creditors.—Residence (if unknown, that fact must be stated). Description of Securities.—When and where debts were contracted.—Value of securities.

	Dollars	Cents
Bank of America, Ontario, California, note secured by trust deed, Date unknown, Contracted at Ontario, California, executed by Domenica Borgoia Cuccia, and Andrea Cuccia, for value and description of property securing said loan, See page 7	12681	15
Bank of America, Ontario, California, Chattell Mortgage, Amount unknown, Date unknown, No Consideration, signed by *deseption*		
Total	12681	15

Andrea Cuccia, Petitioner.

* * * * * * *

[fol. 9] Oath to Schedule A

UNITED STATES OF AMERICA,
Southern District of California,
Central Division, ss:

On this fourth day of August, A. D. 1934, before me, personally came Andrea Cuccia the person mentioned in and who subscribed to the foregoing schedule and who, being by me first duly sworn, did declare the said schedule to be a statement of all his debts, in accordance with the Acts of Congress relating to Bankruptcy.

Noah Adair, Notary Public in and for the County of San Bernardino, State of California. (Seal.)

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

No. 23615-M

In the Matter of ANDREA CUCCIA, Bankrupt

PETITION FOR ORDER DIRECTING ACCOUNTING—Filed February 6, 1936

To the Honorable Judges of the Above Entitled Court:

The petition of Bank of America National Trust and Savings Association respectfully shows:

I

That petitioner is and was at all times herein mentioned a national banking association organized and existing under and by virtue of the laws of the United States of America.

II

That on or about December 5, 1930, the above named bankrupt executed and delivered to petitioner his certain promissory note in words and figures as follows, to-wit:

"$11,850.00. Ontario, California, December 5, 1930.

For value received I promise to pay in lawful money of the United States of America to the order of Bank of America National Trust and Savings Association in its offices in this city the principal sum of Eleven Thousand [fol. 11] Eight Hundred Fifty and no/100 Dollars ($11,850.00) with interest from date on deferred balances until paid at the rate of seven per cent per annum, payable quarterly. Said principal sum and said interest payable as follows: Five Hundred and no/100 Dollars ($500.00), or more and said interest on the 5th day of January 1931, and Five Hundred and no/100 Dollars ($500.00), or more and said interest on the 5th day of February and Ten Thousand Eight Hundred Fifty Dollars on the 5th day of June 1931, on which said date the entire balance of principal and interest then unpaid shall become due and payable.

Should the interest not be so paid it shall become a part of the principal and thereafter bear like interest as the principal. Should default be made in the payment when due of any part or installment of the principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in lawful money of the United States of America.

A deed of trust secures the indebtedness evidenced by this note.

Andrea Cuccia, Minni Borgia Cuccia."

III

That contemporaneously with the execution of the said promissory note and as part of the same transaction and as security for the payment of principal and interest of said indebtedness, the said bankrupt executed and delivered to [fol. 12] petitioner a deed of trust conveying certain real property situated in the County of San Bernardino, State of California, to Corporation of America, a corporation, as trustee, for Bank of America National Trust and Savings Association, as beneficiary; that the said deed of trust was recorded in the office of the County Recorder of the County of San Bernardino, State of California, on January 16, 1931, in Book 694 of Official Records at page 147.

IV

That thereafter, as additional security for the payment of said promissory note, the said bankrupt made, executed and delivered to petitioner a crop and chattel mortgage dated April 13, 1933, wherein and whereby the said bankrupt mortgaged to petitioner all crops of whatsoever kind or character, including that certain crop of grapes of all varieties then planted or growing, or that may during the years 1933 and 1934 be planted or grown or that may be planted or grown prior to the payment in full of the indebtedness secured by said crop and chattel mortgage upon that certain real property situated in the County of San Bernardino, State of California, described in the said chattel mortgage, being the same real property as that described in the deed of trust hereinabove referred to; that the said crop and chattel mortgage was acknowledged so as to entitle the same to be recorded and was thereafter on the 15th day of April, 1933, recorded in the office of the County Recorder of the County of San Bernardino, State of California, in Book 882 of Official Records, at page 872, and was re-recorded on the 3rd day of May, 1933, in the office of said Recorder in Book 891 of Official Records at page 1.

[fol. 13]

V

That on the 4th day of August, 1934, the above named bankrupt filed his petition under Section 75 of the Bank-

ruptcy Act; that the above entitled court thereupon approved the said petition and referred the proceedings thereunder to Noah Adair, Conciliation Commissioner in and for the County of San Bernardino, State of California.

VI

That thereafter the said bankrupt failed to make any agreement of composition or extension with his creditors and on the 7th day of January, 1935, filed a petition under Section 75-S of the Bankruptcy Act as the same existed at that time; that the said bankrupt was thereupon adjudged a bankrupt and the proceedings upon the said petition were referred to D. W. Richards, as Referee in Bankruptcy in and for the County of San Bernardino, State of California.

VII

That thereafter the above entitled proceedings were dismissed by an order of the above entitled court made and entered on the 14th day of October, 1935.

VIII

That the aforesaid crop and chattel mortgage held by petitioner upon all of the crops growing upon the real property of the said debtor was a valid and proper lien upon all crops growing upon the said property during the years 1934 and 1935; that subsequent to the filing of the petition in the [fol. 14] above entitled proceedings Noah Adair, as Conciliation Commissioner in and for the County of San Bernardino, harvested all of the crops growing upon the real property described in said crop and chattel mortgage and received the proceeds thereof; that petitioner has demanded an accounting of the said Noah Adair, as such Conciliation Commissioner, of the proceeds received from the said crops; that the said Noah Adair has failed and refused to render to petitioner an accounting thereof and petitioner is informed and believes and upon such information and belief alleges that the said Noah Adair has received from the proceeds of said crops the sum of approximately $1,500.00.

IX

That during the year 1935, and subsequent to the dismissal of the above entitled proceedings, on October 14, 1935, petitioner is informed and believes and upon such

information and belief alleges that the said Noah Adair, Conciliation Commissioner, sold the crops then growing upon the real property of the said debtor described in the said crop and chattel mortgage hereinabove referred to and upon which petitioner held a valid lien by reason of said crop and chattel mortgage; that the said Noah Adair has failed and neglected and refused to account to petitioner for the proceeds of said crops.

Wherefore, petitioner prays for an order of this court directing the said Noah Adair, as Conciliation Commissioner in and for the County of San Bernardino, State of California, forthwith to render and file in the above entitled proceedings an accounting of all funds received by him as such Conciliation Commissioner from the sale of crops grown [fol. 15] upon the property of the debtor during the years 1934 and 1935.

Bank of America National Trust and Savings Association, by A. G. Maurer, Vice President. Edmund Nelson, Hugo A. Steinmeyer, Attorneys for Bank of America National Trust and Savings Association.

Duly sworn to by A. G. Maurer. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

ORDER DIRECTING ACCOUNTING—Filed February 6, 1936

Upon reading and filing the verified petition of Bank of America National Trust and Savings Association in the above entitled proceedings, and good cause appearing therefor, it is hereby

Ordered that Noah Adair, as Conciliation Commissioner in and for the County of San Bernardino, State of California, render and file in the above entitled pro-eedings within ten days from the date of service of this order a full, true and correct accounting of all moneys received by the said Noah Adair, as Conciliation Commissioner, from crops grown upon the property of the above named bankrupt.

Dated: This 6th day of February, 1936.

Paul J. McCormick, United States District Judge.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

ACCOUNT—Filed February 17, 1936

September 26, 1934—An account in the name of Andrea Cuccia and Noah Adair was opened with the American National Bank, San Bernardino, California, and a deposite of $1437.37 was made	$1,437.37
September 26, 1934—Cash, labor, for 20 men on ranch Court Order issued	$340.00
October 1, 1934—Andrea Cuccia	59.33
October 30, 1934—Andrea Cuccia, 14 days labor Court order issued	42.00
November 27, 1934—Andrea Cuccia, $15. living expense $20. filing fee under 75 (s) and $20. feed for horse. Court order	55.00
December 20, 1934—Andrea Cuccia, $10.00 feed for horse and $10. living expense	20.00
January 22, 1935—Andrea Cuccia, $20. and labor on grove $144.00	164.00
[fol. 18] January 22, 1935—D. W. Richards indemnity fee under Section 75 (s)	18.25
February 1, 1935—Andrea Cuccia, labor, 8 men, 11 day each	264.00
February 15, 1935—Andrea Cuccia labor	90.00
March 15, 1935—Andrea Cuccia, $45. labor; $20. hay and $10. living expense	75.00
April 19, 1935—Jos E. Rich, Court Reporter	22.50
April 19, 1935—Ralph W. Eckhardt, attorneys fee	50.00
April 19, 1935—Andrea Cuccia, 37 days work of hired men	111.00
May 11, 1935—Andrea Cuccia, sulpher for grapes	60.00
June 1, 1935—Andrea Cuccia, labor for two men working in grapes	30.00
Total	$1,401.08
Tax, etc.	.60
	$1,401.68

Balance in bank to date, $35.69.

Noah Adair.

[File endorsement omitted.]

[fol. 19] IN UNITED STATES DISTRICT COURT

OBJECTIONS AND EXCEPTIONS TO ACCOUNT—Filed June 12, 1936

Comes now Bank of America National Trust and Savings Association and objects to the account of Noah Adair, as Conciliation Commissioner, filed in the above entitled proceedings and each and every of the items of disbursement set forth in the said account and for grounds of objection and exception specifies the following:

I

That Bank of America National Trust and Savings Association, hereinafter referred to as said creditor, is a national banking association duly organized and existing under and by virtue of the laws of the United States of America.

II

That on or about December 5, 1930, Andrea Cuccia and Minni Borgia Cuccia executed and delivered to said creditor their promissory note in words and figures as follows, to-wit:

"$11,850.00. Ontario, California, Dec. 5, 1930.

For Value Received I promise to pay in United States Gold Coin of the present standard of weight, fineness and value to the order of Bank of America National Trust and Savings Association in its offices in this city the principal sum of eleven thousand eight hundred fifty and 00/100 dollars ($11,850.00) with interest from date on deferred balances until paid at the rate of seven per cent per annum, payable quarterly. Said principal sum and said interest payable as follows: Five Hundred and 00/-00 Dollars [fol. 20] ($500.00) or more and said interest, on the 5th day of January 1931, and Five Hundred and 00/100 Dollars ($500.00) or more and said interest on the 5th day of February and Ten thousand eight hundred fifty dollars on the 5th day of June, 1931, on which said date the entire balance of principal and interest then unpaid shall became due and payable.

Should the interest not be so paid it shall become part of the principal and thereafter bear like interest as the

principal. Should default be made in the payment when due of any part or installment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States, of the present standard of weight, fineness and value.

A deed of trust secures the indebtedness evidenced by this note.

Andrea Cuccia, Minni Borgia Cuccia."

III

That at the time of the execution of said note and as part of the same transaction the said Andrea Cuccia and Minni Borgia Cuccia in order to secure the payment of the said promissory note and of the moneys and interest therein provided and agreed to be paid, executed and delivered a deed of trust to Corporation of America, as trustee in favor of said creditor, as beneficiary, covering the real property situated in the County of San Bernardino, State of California, described as follows, to-wit:

[fol. 21] "The North Half (N. ½) of the North One-Third (N. ⅓) of the West Half (W. ½) of Section Sixteen, Township One South, Range Six West, San Bernardino Base and Meridian, in the County of San Bernardino, State of California, according to Government Survey.

Saving and excepting therefrom the South Half (S. ½) of that portion of the North Half (N. ½) of the North One-Third (N. ⅓) of the West Half (W. ½) of said Section 16, described as follows:

Beginning at a point where there is set a three-fourths (¾) inch iron pipe set on a paved road known as Etiwanda Road, being set for the Northwest corner of Section Sixteen (16), Township One (1) South, Range Six (6) West, San Bernardino Base and Meridian; thence North 88° 30' East Two Hundred Fourteen and Ten-hundredths (214.10) feet to a point, thence at right angles in a Southerly direction three hundred sixty-six and fifty-five hundredths (366.55) feet to a point, thence at right angles Two Hundred Fourteen and ten-hundredths (214.10) feet to a point on the line of Etiwanda Road; thence at right angles and along the line of Etiwanda Road Three Hundred Sixty-six and Fifty-five hundredths (366.55) feet to the place of

beginning, containing One and Seventy-nine Hundredths (1.79) acres, more or less."

IV

That the said deed of trust was recorded in the office of the County Recorder of the County of San Bernardino, State of California, on January 30, 1931, in book 696 of Official Records at page 96.

V

That on or about April 13, 1933, as further security for the indebtedness evidenced by the said promissory note [fol. 22] hereinabove referred to, said Andrea Cuccia and Minni Borgia Cuccia executed and delivered to said creditor a crop and chattel mortgage upon all crops of whatever kind or character, including that certain crop of grapes of all varieties then planted or growing or that might during the years 1933-34 be planted or grown or that might be planted or grown prior to the payment in full of the indebtedness secured by the said crop and chattel mortgage upon the said real property hereinabove described in paragraph III hereof.

VI

That said crop and chattel mortgage contained the affidavit of good faith of the mortgagor and mortgagee required by law and was duly acknowledged so as to entitle the same to be recorded and was thereafter recorded in the office of the County Recorder of the County of San Bernardino, State of California, on April 15, 1933, in Book 882 of Official Records at page 272, and was re-recorded in the said County Recorder's office on May 3, 1933, in Book 891 of Official Records at page 1.

VII

That no part of the principal or interest of said indebtedness has been paid except that interest thereon has been paid to October 17, 1935, and the sum of $6,915.32 has been paid on account of the principal thereof and there is due, owing and unpaid on account of the said indebtedness the sum of $4,934.68, together with interest thereon at the rate [fol. 23] of seven per cent per annum from October 17, 1935.

VIII

That the sum of $1,437.37 shown by the said account to have been received by the said Noah Adair, as Conciliation Commissioner, was the proceeds of the sale of the crop of grapes grown upon the real property hereinabove described during the year 1934; that the said crops were subject to the crop mortgage executed by the above named debtor hereinabove described and said moneys received by the said Noah Adair with full knowledge that the said crops and the proceeds thereof were subject to the crop mortgage held by said creditor.

IX

The said creditor did not at any time during the pendency of the said proceedings have knowledge or notice of any order made by the above entitled court respecting the disbursement of any of the funds disbursed as shown by the said account and no valid order for the disposition of any of said funds was at any time made by the above entitled court.

X

That Andrea Cuccia, the debtor in the above entitled proceedings, filed a petition under Section 75 of the Bankruptcy Act on August 4, 1934; that thereafter on January 7, 1935, said debtor filed an amended petition under Subsection S of Section 75 of the Bankruptcy Act and was adjudicated a bankrupt under the said section and the [fol. 24] proceedings thereon were thereupon referred to D. W. Richards, Referee in Bankruptcy in and for the County of San Bernardino, State of California; that subsequent to the reference of said proceedings on January 7, 1935, to the said D. W. Richards, as Referee in Bankruptcy, Noah Adair, as Conciliation Commissioner, no longer had jurisdiction of the said proceedings.

Wherefore, said creditor prays that an order be made fixing the time of hearing upon the foregoing objections and exceptions to the said account and directing notice thereof to be given to the said Noah Adair, as Conciliation Commissioner in and for the County of San Bernardino, State of California, and that upon the hearing upon the said objections the said account and each and every of the items thereof be disallowed and that the said Conciliation

Commissioner be surcharged with the full amount of moneys received by him and improperly disbursed in the above entitled proceedings and that the said Commissioner's bond be delivered up to said creditor for the purpose of bringing an action thereon.

Bank of America National Trust and Savings Association, by A. G. Maurer, Vice President. Edmund Nelson, Hugo A. Steinmeyer, Attorneys for Bank of America National Trust and Savings Association.

[fol. 25] *Duly sworn to by A. G. Maurer. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

CONCILIATION COMMISSIONER'S ANSWER TO OBJECTION TO ACCOUNT—Filed July 13, 1936

Comes now Noah Adair Conciliation Commissioner of San Bernardino, California to whom the above entitled matter was referred by the above named court in the above entitled proceedings August 6, 1934, and for answer to the objection of the Bank of America, National Trust & Savings Association to his account, states as follows:

That the land upon which said Bank of America claims a trust deed and a crop mortgage on the crops grown on said land is a grape vineyard which was in the possession of said debtor when this proceedings was institnted and has been in the possession of said debtor ever since, under the jurisdiction of the court. That the money received by said Conciliation Commissioner was the proceeds from the crop of grapes harvested under the direction of the Conciliation Commissioner in September, 1934, while said premises and said crops were under the exclusive jurisdiction and control of the court herein.

That said Bank of America claims a crop mortgage upon said premises covering crops for the year 1934 and 1935 and for the protection of said premises and said crops it is absolutely necessary that said vineyard on said land be attended to and all the items paid for labor and living

expenses of the debtor and feed for his horses were absolutely necessary to be paid in order to have said vineyard properly attended to. That the money paid to the debtor [fol. 27] was no advancement for his personal benefit but as pay for his work and the amount advanced him for feed for his horse and living expense was less than the payment to him of ordinary wages for the work which he actually and necessarily performed in the care of the crop and for the preservation of the vineyard and future crops thereon for the benefit of creditors and lien claimed by said Bank of America thereon.

That said debtor did not have any other means for his living expenses and therefore could not have performed said work without getting his feed.

That the item of $18.25 paid to D. W. Richards Indemnity fee was the fee required by said D. W. Richards, Referee in Bankruptcy in order to call the first meeting of creditors and was necessary to be paid in order to expedite the administration of the estate and preserve the assets for the benefit of creditors and said Bank of America, who claimed a lien thereon and was paid January 22, 1935 on the order of said D. W. Richards acting as Referee in the matter.

That the item of $22.50 paid to Joe E. Rich Court Reporter which was paid April 19, 1935 was also paid on the order of D. W. Richards Referee and this service was performed by said Reporter at the request of Hugo A. Steinmeyer attorney for said Bank of America in his letter dated February 6, 1935 addressed to said D. W. Richards requesting a shorthand reporter to take down the testimony as he desired to examine the bankrupt at the first meeting of creditors and at said examination of the bankrupt there did [fol. 28] most of the examining of said bankrupt and other parties and caused the said claim to be incurred by such a lengthy examination that the transcribing of same required about 35 pages.

That the item of $50.00 paid to Ralph W. Eckhardt paid April 19, 1935 was attorney fee for the attorney for the bankrupt which was also paid on an order of approval of said D. W. Richards Referee and was necessary expense incurred in the estate caused by the most vigorous attacks made by the attorney for the said Bank of America against

the carrying on of the administration under these proceedings.

That if the expenses set out in the account had not been paid and the care of said premises and crops had not been made, it would have resulted in a loss of crops and damage to the vineyard and premises greater than the total amount paid out under the orders of the Conciliation Commissioner herein, as set out in the account.

That while said Conciliation Commissioner has been informed that the said Bank of America claimed a crop mortgage upon the crops, said bank has not objected to the use of the crops in payment of the necessary performances and care for the crop and vineyard or necessary expenses in carrying on this proceedings until October 3, 1935 when all of said money had been expended and that said Bank of America had full knowledge December 13, 1935 of all items of the account to which an objection is made as a copy of said account was sent out in an injunction proceeding had against the said Bank of America at that time herein, and [fol. 29] that the same items of account were later filed with the court hereon on the demand of said bank under order directed to be filed February 6, 1936 and said Bank of America waited five months after that before making objections to said items.

That the said Bank of America never has proven it's claim covering its alleged crop mortgage or chattel mortgage for the crops grown on said premises with the Conciliation Commissioner herein and that said claim has not been allowed or approved by the court and no copy of the said mortgage or original has been filed with the said Conciliation Commissioner herein. That a proof of it's secured claim was filed with D. W. Richards acting as Referee February 14, 1935 but said Bank of America by proof of claim sets up its claim to a crop mortgage on the crops for the years 1934 and 1935 but no copy nor the original of mortgage is annexed thereto, and said Conciliation Commissioner has no knowledge that the said Bank of America has a valid crop mortgage on crops grown on said premises grown during the years of 1934 and 1935.

That said funds collected from the crops were duly deposited by said Conciliation Commissioner in the American National Bank in his official capacity and said sums in his

account have all been paid on his orders exclusively for the benefit of said estate according to his best judgment.

Noah Adair, Conciliation Commissioner.

[fol. 30] *Duly sworn to by Noah Adair. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING OBJECTIONS AND EXCEPTIONS—September 14, 1936

This matter coming before the court for hearing on Objections and Exceptions of Bank of America National Trust & Savings Association to account of Noah Adair, Conciliation Commissioner, pursuant to order filed June 12, 1936, and on Answer of Conciliation Commissioner thereto; Hugo A. Steinmeyer, Esq., appearing as counsel for Bank of America, etc., and N. C. Peters, Esq., appearing for Conciliation Commissioner; C. W. McClain being present as official court reporter;

[fol. 32] Noah Adair is called, sworn, and testifies on direct examination by H. A. Steinmeyer, Esq., and there are offered, admitted in evidence, and marked

Creditor's Ex. 1. Copy of Referee's and Conc. Commis. Docket.

Creditor's Ex. 2. Copy of Petition of Debtor to expend funds.

Creditor's Ex. 3. Copy of Petition of Debtor for allowance & ord. thereon.

Creditor's Ex. 4. Copy of Letter, dated 11/2/34.

Creditor's Ex. 5. Copy of Letter dated 11/6/34.

Noah Adair testifies upon cross-examination by N. C. Peters, Esq., and answers questions propounded by the Court, and testifies upon redirect examination by H. A. Steinmeyer, Esq., and there are offered, admitted in evidence, and marked

Creditor's Ex. 6. Photostatic copy Corp. & Chattel Mortgage.

Conc. Com'r Adair's Ex. "A". Letter dated 2/6/35 from Bank of America to D. W. Richards.

Noah Adair testifies further upon re-cross-examination by N. C. Peters, Esq.

It is ordered that the Objections and Exceptions to the account be overruled and that same be settled and allowed. Exception noted in behalf of creditor.

[fol. 33] IN UNITED STATES DISTRICT COURT

Statement of Evidence on Appeal—Filed November 17, 1936

Be it Remembered that Noah Adair, Conciliation Commissioner in and for the County of San Bernardino, State of California, filed herein an accounting of moneys received and disbursed by him in the matter of the estate of Andrea Cuccia, bankrupt under Section 75 of the Bankruptcy Act, and that Bank of America National Trust and Savings Association having filed verified objections and exceptions to said account and the said Noah Adair having filed a verified answer to the said objections and exceptions and that a hearing upon the said account and the said objections and exceptions was duly had before the above entitled court, the Hon. Paul J. McCormick, presiding, on the 14th day of September, 1936, at which hearing the said Noah Adair appeared in person and by his counsel, N. C. Peters, and Bank of America National Trust and Savings Association appeared by its attorney Hugo A. Steinmeyer, and the following proceedings were had:

NOAH ADAIR, witness for Bank of America National Trust and Savings Association was sworn and testified:

Direct examination:

I am Conciliation Commissioner for San Bernardino County and was such Commissioner on August 6, 1934, and filed on behalf of Andrea Cuccia his debtor's petition under [fol. 34] Section 75 of the Bankruptcy Act on August 4,

1934. I couldn't definitely say, but I think the schedules filed with that petition were prepared in my office and they were verified before me. I believe that the document shown to me designated Referee's and Conciliation Commissioner's Docket is a correct statement of the entries made in the docket of this case in my office and in the office of D. W. Richards, Referee in Bankruptcy for San Bernardino County.

(Here was received in evidence Creditor's Exhibit No. 1, reading as follows:

EXHIBIT 1

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 23,615-M

In the Matter of ANDREA CUCCIA, Debtor

REFEREE'S AND CONCILIATION COMMISSIONER'S DOCKET

August 4, 1934. Schedules filled out and signed by Conciliation Commissioner and Debtor.

August 4, 1934. Domenica Borgia Cuccia deeded her interest in property to Andrea Cuccia, her husband.

[fol. 35] August 6, 1934. Approval of Debtors petition & Order of Reference, signed and accepted by the United States District Court.

August 29, 1934. Complaint to Foreclose Crop & Chattel Mortgage, filed by Edmund Nelson and Hugo A. Steinmeyer, attorneys for the Bank of America National Trust & Savings, together with copy of Crop & Chattel Mortgage.

September 1, 1934. Summons served by Bank of America.

September 18, 1934. First Meeting of Creditors.

September 18, 1934. Composition and/or Extension proposed and discussed.

September 21, 1934. Order of Conciliation Commissioner setting Aside Exempt property.

September 26, 1934. Order Authorizing Debtor to pay pickers. Labor for harvesting grapes from his 53 acre vineyard.

October 30, 1934. Order paying debtor $3.00 per day for 14 days. Labor on his above mentioned vineyard. Living expenses.

November 23, 1934. Proof of priority Wage Debt, filed by Tony Sciacca.

November 27, 1934. Order authorizing debtor to buy groceries for himself family, and feed for his horse.

December 20, 1934. Order authorizing debtor to buy feed for his horse.

[fol. 36] January 5, 1935. Debtors Amended Petition, Report of Conciliation Commissioner to Referee, Certificate of Conciliation Commissioner, filed with United States District Court.

January 7, 1935. Adjudication under Section 75 (s) of the Bankruptcy Act.

January 10, 1935. Notice of Dismissal, filed by Edmund Nelson & Hugo A. Steinmeyer, attorneys for the Bank of America.

January 11, 1935. Notice to Attorney for Bankrupt.

January 16, 1935. Subpœna served.

January 30, 1935. First Meeting of Creditors set for February 12, 1935.

January 31, 1935. Affidavit of mailing notice of First Creditors Meeting.

February 5, 1935. Debtors Petition for Appraisal, etc.

February 5, 1935. Petition of Debtors Attorney for Allowance of fee.

February 14, 1935. Meeting of creditors pursuant to continuance from Feb. 12, 1935. Following appearances: Mr. Cuccia, Mr. Steinmeyer for Bank of America, Mr. Eckhardt, for Bankrupt. Mr. Rich appointed to report testimony, Charles P. Locave appointed to act and sworn in as an interpreter. Mr. Cuccia sworn and examined by the attorneys. Mr. Steinmeyer filed objections and exceptions to proceedings. Mr. Adair sworn, Mr. Wayman sworn.

[fol. 37] February 14, 1935. Proof of Secured Debt filed by Bank of America, $13,821.67.

February 14, 1935. Objections and Exceptions of Bank of America to Proceedings of Debtor under Section 75 of the Bankruptcy Act.

February 16, 1935. Motion to Dismiss filed by Hugo A. Steinmeyer for Bank of America.

February 16, 1935. Points & Authorities in Support of Motion to Dismiss filed by Hugo A. Steinmeyer, for Bank of America.

February 16, 1935. Motion to Dismiss filed by Bank of America.

February , 1935. Points & Authorities in opposition to Motion to dismiss filed by Ralph W. Eckhardt, attorney for Debtor.

March 2, 1935. Affidavit of Publication Notice of first meeting.

April 16, 1935. Order of Dismissal, signed by D. W. Richards, Referee in Bankruptcy.

April 19, 1935. Notice of Entry of Order Filed by Edmund Nelson and Hugo A. Steinmeyer, attorneys for Bank of America.

April 25, 1935. Petition for Review of Order of Referee.

Copied from the Referee's Docket

June 22, 1935. Report of Referee.

June 22, 1935. Certificate of Referee for Dismissal.

June 27, 1935. Report and certificate of Referee for Dismissal mailed to Clerk.

[fol. 38] August 9, 1935. Affidavit of Mailing notice of Final Meeting.

August 17, 1935. Final meeting pursuant to notice. Case ordered dismissed subject to payment of appraisers' fees, $30.00 and Referee's fee, $4.75.

July 11, 1935. Files turned over to Noah Adair, Conciliation Commissioner.

Dated October 10, 1935.

Respectfully submitted, Hazel Kelley, Secretary to Noah Adair, Conciliation Commissioner for San Bernardino County, State of California.

STATE OF CALIFORNIA,
County of San Bernardino, ss:

I, Noah Adair, Conciliation Commissioner of the District Court of the United States for the Southern District of California, Central Division, in San Bernardino County, California, do hereby certify that the attached is a true, full and

correct copy of the papers and instruments in the debtor, Andrea Cuccia's file, in my office, care, and custody.

Dated this 10th day of October, 1935.

Noah Adair, Conciliation Commissioner for San Bernardino County, State of California.

[fol. 39] ADAIR (resuming his testimony):

This debtor in January, 1935, filed an amended petition under Section 75 (s) of the Bankruptcy Act and the proceedings were thereupon referred to D. W. Richards, Referee in Bankruptcy for San Bernardino County, and my file in the matter was turned over to Mr. Richards at that time. The matter was referred to Richards on January 7, 1935. I think I was named as trustee *by* never qualified. I would have to check to make sure of the date that the proceedings were dismissed by Referee Richards. I think I have a copy of the order in my file. I presume that I heard of the order made by Referee Richards dismissing the proceedings. I have receipts for the item shown in the account of an expenditure of $340.00 cash for labor of 20 men on the ranch for September 26, 1934. I paid the money to Mr. Cuccia and instructed him to pay the other people and take their rece-pts and bring the receipts to me. I do not know whether the money was paid in currency or by check. The bank account was in my name together with Andrea Cuccia at the American National Bank. With reference to the statement "Court Order Issued", I issued the court order. That $340.00 and the next item, $59.33, makes up this order that I signed for $402.39.

(Here was received in evidence Creditor's Exhibit No. 2, the same reading as follows:

[fol. 40] EXHIBIT 2

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 23615-M

In the Matter of ANDREA CUCCIA, Debtor

IN PROCEEDINGS FOR A COMPOSITION OR EXTENSION UNDER SECTION 75

Before Noah Adair, Conciliation Commissioner of San Bernardino County, California: To whom the above matter was referred:

Comes the above named debtor represents that he is the owner of fifty-three (53) acres of land which is set to grapes and that since said debtor filed his petition under Section 75 of the Bankruptcy Act, that it has been necessary to harvest said grapes.

That he is indebted to the parties hereinafter mentioned, for their labor and he hereby petitions that he be allowed to use $402.39 to pay for said labor as follows:

Cosme Viquiu	$11.91
Frank Cuccia	47.50
Tilo A. Gallardo	5.96
Ramona Garsia	5.40
Maria Leyano	11.01
Frank Diaz	7.26
Don Cacciatore	39.25
[fol. 41] Jose M. Ganes	19.68
Leo Salais	19.98
Felipe Granados	11.28
Joe Castellano	48.30
Ynez Leiva	4.68
Bartola Urtiaga	8.88
Sara Valanzuela	14.67
Salome Alemaro	20.76
Joe Valadez	6.54
P. Guidera	47.50
John Urquizu	12.50
Tony Torres	14.00
Rosarro Barreras	45.33
Total	$402.39

Andrea Cuccia, Debtor.

I, the undersigned, Noah Adair, Conciliation Commissioner for San Bernardino County, California, to whom the above matter was referred, hereby approve the above petition and direct that said labor be paid out of the funds now available and deposited in the American National Bank.

—— ——, Conciliation Commissioner of San Bernardino County, California.

[fol. 42] (Here was received in evidence Creditors Exhibit No. 3, the same reading as follows:

EXHIBIT 3

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 23,615-M

In the Matter of ANDREA CUCCIA, Debtor

IN PROCEEDINGS FOR A COMPOSITION OR EXTENSION UNDER SECTION 75

Before Noah Adair, Conciliation Commissioner of San Bernardino County, California; To whom the above matter was referred;

Comes the above named debtor and represents that he is in need of money to buy feed for a horse which he estimates at about $10.00 and that he has no money to buy food for himself and family. He asks that $10.00 be allowed for the purpose of buying groceries.

Andrea Cuccia, Debtor.

I, the undersigned, Noah Adair, Conciliation Commissioner for San Bernardino County, California, to whom the above matter was referred, hereby approves the above petition and the same is hereby ordered.

Noah Adair, Conciliation Commissioner for San Bernardino County, State of California.

[fol. 43] ADAIR (resuming his testimony):

I hardly think that I have any other orders for expenditures on this account. I think that probably the expenditure on January 22, 1935, was after these proceedings had been removed from my jurisdiction. I think it is correct that all of the remaining expenditures were made after these proceedings had been transferred to Mr. Richards, Referee in Bankruptcy. I did not secure any order from the United States District Court for the disbursement of any of those funds. I did not secure any order signed by D. W. Richards, Referee in Bankruptcy, except to the extent that he O. K.'d

and initialed each one of the checks. No notice was given to any creditor of the fact that the petition for the expenditure of money had been filed and that an order was to be made and no notice was given to any creditor after the order was made. No notice was given to the Bank of America that I remember of.

(Here was received in evidence Creditors Exhibit No. 4, the same reading as follows:

[fol. 44] EXHIBIT 4

(Copy)

Los Angeles Main Office

Legal Dept.

Los Angeles, California, November 2, 1934.

Mr. Noah Adair, Conciliation Commissioner, 315 Court Street, San Bernardino, California

In re Andrea Cuccia, Debtor

No. 23615-M

DEAR SIR:

In the above matter on August 4, 1934, Andrea Cuccia filed his petition under Section 75 of the Bankruptcy Act. The first meeting of creditors was held on September 18, 1934 and continued to October 16, 1934.

We are advised that neither at the original meeting nor at the continued meeting was any extension proposal or offer of compromise made by the debtor.

[fol. 45] We call your attention to the last paragraph of rule 78 of the United States District Court Rules, which requires that unless a debtor filing a petition under Section 74 of the Bankruptcy Act files at the first meeting of creditors his offer in writing with full details and particulars that he shall immediately be adjudged a bankrupt and further proceedings shall be taken under the Bankruptcy Act.

While this rule, to our knowledge, has not been applied to petitions filed under Section 75 of the Bankruptcy Act we are satisfied that the same reasons for the requirement of promptness exists.

We hereby make demand upon you that as Conciliation Commissioner you file with the United States District Court a report of the proceedings taken by you in the above matter.

Yours very truly, Hugo A. Steinmeyer, Assistant Attorney.

HAS:HEM.

cc. to H. A. Chandler, Asst. Vice President, District No. 5, L. A. M. O.

cc. to C. A. Warren, Manager, Ontario Branch.

[fol. 46] (Here was received in evidence Creditors Exhibit No. 5, the same reading as follows:

EXHIBIT 5

(Copy)

San Bernardino, Calif., November 6, 1934.

Bank of America, Main Office, Los Angeles, California.

Attention Mr. Hugo A. Steinmeyer

Re Andreas Cuccia No. 23,615-M

DEAR SIR:

In answer to your letter of November 2, 1934, desire to say that it would be premature at this time to file a report on this matter.

Most respectfully, (Signed) Noah Adair, Conciliation Commissioner for San Bernardino County, California.

NA:HK.

[fol. 47] Cross-examination.

By Mr. Peters:

The amount paid to the debtor does not cover any more than the actual value of the services rendered in taking care of the vineyard. I paid no more than actual common

wages for the work done during that period and used the scale that was paid for such labor at that time. The amount paid for feed for the horse was on the same scale as if I had paid for the work of the horse.

With reference to the item of April 19, 1935, to Joe E. Rich, court reporter, the request for the reporter was made by Mr. Steinmeyer and he conducted nearly all of the examination during the time that I was present. The item of January 22 to D. W. Richards, indemnity fee under Section 75 (s), $18.25, covers his demand for costs for the first meeting of creditors. The amount had to be paid before the first meeting could be called or would be called. The item of May 11 for sulphur for the grapes was used in taking care of the vineyard. All of the money was paid out through checks from the United States depository and all payments were authorized and requested to be made by D. W. Richards after he took charge. The grove was properly cared for during the year following my taking charge.

By the Court:

Cuccia first filed a petition under Section 75 and then later asked to file under subdivision (s) of Section 75. During the time that the proceeding was pending under Section 75 I picked and sold the grapes on the vineyard and collected the money for it and that is the money in [fol. 48] question. I paid for the picking of the grapes $403.00 or $402.00, whatever it is, and advanced money for the care and upkeep of the vineyard. I was consulted about the number of men who would be necessary on the property and was familiar with the requirements of conserving ranch property and did not allow any more labor to be employed upon the ranch than in my judgment was reasonably necessary to conserve the property for the benefit of whomever might own it. The property was 53 acres of vineyard. The grapes mature at certain times and in order to mature at those times they have to be properly cultivated, tended to and then picked at particular times in order that they may be marketed and anyone, whether it be a lien claimant or any other property owner holding a proprietary interest in that vineyard, would have to conserve the estate for its benefit and that is exactly what I did.

The order of adjudication and reference under Section 75 (s) of the Bankruptcy Act was January 7, 1935, and

that was under the first amendment of subdivision (s) of Section 75 and afterwards there was a reinstatement in October of 1935. The expenses for labor, etc., were incurred between September 28, 1934, and June 1, 1935. D. W. Richards, referee in bankruptcy, asked that I pay the attorney $50.00. When this matter was referred to D. W. Richards, as referee, I wanted him to take the money I had on hand and become the custodian of it. He asked me to keep the money and said he would trust me in the expenditure of the money while it was under him and that he would O. K. the checks, so all the checks that were written after it went to D. W. Richards were O. K.'d by him and I wrote the checks at his request. I had nothing [fol. 49] to do with the appointment of Eckhardt as attorney or with his designation as the attorney in the matter. He might have acted for other parties but I don't think he had acted before me for Andrea Cuccia.

I paid the charge of Joseph E. Rich, court reporter, $22.50, on April 19, 1935, at the request of Mr. Richards. Mr. Rich was a reporter in Referee Richards court on that particular occasion. Mr. Rich was not the regular reporter in the Referee's court. Mr. Richards ordered the money paid to Joseph Rich and I paid the money out of the funds held as Conciliation Commissioner. I had ascertained that Rich had performed services as a court reporter in reporting proceedings before the Referee.

The items subsequent to April 19, 1935, were for 37 days work of hired men, $111.00. Then on May 11, 1935, Andrea Cuccia, sulphur for grapes, $60.00, and labor for two men working in grapes $30.00, were all paid for the care and upkeep of the vineyard and labor performed. I did not derive any benefit myself in any way from any of those expenditures nor was there any agreement or understanding that I was to receive any part of the money and I haven't retained any part of the money nor received any benefit from any part of the money which has been shown disbursed in these various disbursements.

Redirect examination.

By Creditor:

There was not any order filed in the proceedings for the expenditure of any of these moneys after the appointment of Mr. Richards on January 7, 1935. When I said that

Mr. Richards O. K.'d the checks, I mean that after we [fol. 50] discussed it together we came to the conclusion that it should be done and he told me to go ahead and do it. Then I wrote the checks and signed them and then he O. K.'d them. He wrote O. K. on the checks and signed his initials underneath the O. K. Just "O. K. D. W. R." Although the transcript shows that the Referee had signed a dismissal of these proceedings on April 16, 1935, these items were earned by the people who performed the services prior to the dismissal. I did not see any order signed by Referee Richards and filed in the proceedings. He O. K.'d the checks. I think, that he O. K.'d the checks after he had signed the dismissal. I do not have the checks with me. I think they are in the American National Bank. They are, however, for services that had been rendered before Richards dismissed the case and before Richards as Referee in Bankruptcy.

(Here was received in evidence Creditors Exhibit No. 6, the same reading as follows:

EXHIBIT 6

Crop and Chattel Mortgage

This Mortgage, made this 13th day of April 1933, by Andrea Cuccia and Minni Cuccia, husband and wife, by occupation Farmer, mortgagor (it is distinctly understood that the word "mortgagor" referring to the mortgagor, as used herein, is intended to and does include the masculine, feminine and neuter genders and the singular and plural numbers), to Bank of America National Trust and Savings Association, a National Banking Association, duly organized and existing under and by virtue of the laws of the United States of America, mortgagee,

[fol. 51] Witnesseth: That said mortgagor does hereby mortgage to the said mortgagee all the following described crops and personal property situated in the County of San Bernardino State of California, to-wit:

All crops of whatsoever kind or character, including that certain crop of Grapes of all varieties, now standing, planted or growing, or that may during the years 1933 and 1934 be planted or grown, or that may be planted or grown

prior to the payment in full of the indebtedness secured by this mortgage, on the land and premises situated in the County of San Bernardino, State of California, and described as follows, to-wit:

The North one-half of the North one-third of the West one-half of Section sixteen (16), Township one (1) South, Range six (6) West. San Bernardino Base and Meridian, in the County of San Bernardino, State of California, according to Government survey thereof. Saving and Excepting therefrom, the South half (S. ½) of that portion of the North half (N. ½) of the north one third (N. ⅓) of the west half (W. ½) of said section 16, described as follows: Beginning at a point where is set a three fourths inch iron pipe set on a paved road known as Etiwanda Road, being set for N. W. corner of Section 16, Twp. 1, South Rge. 6, West, San Bernardino base and meridian, thence north 88° 30′, east 214.10 feet to a point, thence at right angles in a southerly direction 366.55 feet to a point, thence at right angles 214.10 to a point on the line of Etiwanda Road; thence at right angles and along the line of Etiwanda Road 366.55 feet to the point of beginning, containing 1.79 acres more or less.

[fol. 52] And also the following described personal property, together with the increase thereof, if any, situated in or on said hereinbefore described real property, to-wit:

(all of said crops and personal property being owned by, and in the possession of said mortgagor), as security for the payment of said mortgagee of the sum of Twelve thousand two hundred and seventy five Dollars,

RE552.

Installment Note

(Principal Payable in Installments—Interest Separately)

$11,850.00. Ontario, California. Dec. 5, 1930.

For Value Received I promise to pay in United States Gold Coin of the present standard of weight, fineness and value to the order of

Bank of America

National Trust & Savings Association

in its offices in this city the principal sum of Eleven Thousand Eight Hundred Fifty and 00/100 Dollars ($11,850.00)

with interest from date on deferred balances until paid at the rate of seven per cent per annum, payable quarterly. Said principal sum and said interest payable as follows: Five Hundred and 00/100 Dollars, ($500.00), or more and said interest, on the 5th. day of January 1931, and Five Hundred and 00/100 Dollars ($500.00), or more and said interest on the 5th day of [each and every]* February and [thereafter until the]* Ten Thousand Eight Hundred and Fifty dollars on the 5th day of June 1931, [19]* on which said date the entire balance of principal [fol. 53] and interest then unpaid shall become due and payable.

Should the interest not be so paid it shall become part of the principal and thereafter bear like interest as the principal. Should default be made in the payment when due of any part or installment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States, of the present standard of weight, fineness and value.

A Deed of Trust Secures the indebtedness evidenced by this note.

Andrea Cuccia. Minni Borgia Cuccia.

Interest Paid

Date Paid	Amount	Paid To
4-2-32	31.16	3-5-32
9-19-32	16.80	9-19-32

For Value Received, I hereby guarantee payment of the within obligation and all renewals or extensions thereof, and I hereby waive presentation, demand, protest, notice of protest and notice of non-payment.

No. 3422

$425.00 Due Sept. 1, 1931.

Ontario, Calif., April 10, 1931.

On Sept. 1, 1931, for Value Received, I promise to pay, in United States gold coin of the present standard of [fol. 54] weight, fineness and value, to the order of the

[* Matter enclosed in brackets, struck out in copy.]

Bank of America

National Trust & Savings Association

at its office in this city—Four Hundred Twenty Five—Dollars, with interest from date at the rate of 8 per cent per annum until paid. Payable on Sept. 1, 1931, and demand thereafter in like gold coin, and in addition thereto, in the event of suit to enforce payment of this note, such additional sum as attorneys' fees as the court may adjudge reasonable.

Andrea Cuccia.

Address: Etiwanda Calif.
Telephone: ——.

As collateral security for the payment of the above note and interest, and of any expenses, including attorneys' fees, that may be expended in collection of said note and interest, the undersigned hereby assigns and transfers to and deposits with the aforesaid Bank the following described property to-wit: (1) one share Etiwanda Water Company Stock—Cert. #1492 which property the undersigned, in the event of its deterioration or its falling in cash market value or on default in payment of the above note at maturity, hereby authorizes and empowers the said bank, its successors or assigns, at its or their option, to [fol. 55] sell, in whole or in part, without any previous demand on or notice to the undersigned, through Brokers' Board or at public or private sale, and without advertisement, with the right of said bank, its successors or assigns, to become purchaser at any such sale of the whole or any part of such collateral, and from the proceeds derived from any such sale to pay at maturity the principal and interest of the above note and all charges including the legal expenses and costs of such sale and the balance, if any, to the undersigned or order. Said bank may assign or transfer the above note and in case of such assignment or transfer said collateral security shall also be transferred and the transferee shall have the same rights and powers with reference to this note and the collateral transferred therewith as are hereby given to or as may be otherwise possessed by said bank. The word "undersigned" as herein used, shall indicate the depositor of the above security, and shall include the singular and plural numbers.

Upon payment of said promissory note and interest and of all other indebtedness of the undersigned to said bank and costs and expenses and attorneys' fees, this agreement shall terminate and any collateral security held hereunder shall be returned to the undersigned.

Andrea Cuccia.

As per Copies Hereto Attached

($—) in gold coin of the United States of America of the present standard of weight, fineness, and value. Said Notes secured by Trust Deed; this mortgage being as additional security thereto and also as security for the payment by said mortgagor to mortgagee of all sums hereafter [fol. 56] advanced by said mortgagee to said mortgagor; also as security for the discharge and performance of all obligations and promises by said mortgagor herein contained, and all other past, present or future demands or claims of any kind or character of said mortgagee against said mortgagor whether absolute or contingent and whether due or not due; and also as security for the payment of all other moneys that may become due to said mortgagee from said mortgagor under the terms of this mortgage.

Said mortgagor hereby declares and hereby warrants to said mortgagee that said mortgagor is the absolute owner and in possession of all said mortgaged property hereinabove described, and that the said property is free and clear of all liens, encumbrances and adverse claims whatsoever.

And as further security for the payment, by said mortgagor to said mortgagee, of the note or notes hereinabove referred to and all indebtedness and obligations secured hereby, said mortgagor hereby mortgages to the mortgagee herein named all of the right, title and interest of said mortgagor in and to the lot, piece or parcel of land hereinbefore described upon which said mortgaged crop is to be grown or upon which said personal property is situated.

Said mortgagor promises and agrees: to pay the principal sum of said promissory note or notes, together with interest thereon, at the time and in the manner therein provided, and to pay when due all sums secured hereby, and to perform each and every covenant and condition of this mortgage; during the continuance hereof to properly care for and keep said mortgaged property herein described in [fol. 57] first class condition, order and repair and insured

against all loss or damage by fire and such other casualties as may be designated by the mortgagee and in an amount required by the mortgagee, not to exceed, however, the value of said mortgaged property, or the amount due the mortgagee, in some insurance company, or companies, to be approved by the mortgagee, the policies of which insurance shall be payable in case of loss to the mortgagee and shall be delivered to and held by the mortgagee as security; to pay all taxes, liens or assessments of whatsoever kind or description that may be levied against said mortgaged property, or any part thereof, when the same shall become due and prior to the time when the same shall become delinquent; to comply and use said mortgaged property and each and every part thereof in strict conformity with all laws, ordinances, regulations and statutes with reference to the use, operation and registration thereof; not to remove, or permit to be removed, any part of said property from the premises on which said property is now situated, without the written consent of said mortgagee, or to sell or to attempt to sell, or further mortgage the said property without such consent, and to immediately notify the mortgagee in the event of any damage to said property from any cause whatsoever; that all additions, accretions, repairs to, improvements and increases of said mortgaged property shall immediately become subject to all the provisions of this mortgage; to attend to, care for, cultivate, irrigate and protect said crop or crops hereinabove mentioned and described, in a good, farmer-like manner, and according to the most approved methods of farming, until the same shall be ready for harvesting, and then to harvest and prepare said crop or crops for market, and [fol. 58] when said crop or crops are so prepared, to deliver said crop or crops to the mortgagee, who may sell and dispose of the said crops at the then market price and apply the proceeds of said sale toward payment of the notes and obligations secured thereby, and that the lien of this mortgage shall attach to said crop or crops after the same have been severed and until the amounts secured hereby have been paid in full; to keep the premises on which said crops are grown free from dandelion and other noxious weeds, or grasses, and to keep said premises where said crops are grown properly cultivated, and to protect

said crops from damage by squirrels, insects and other pests detrimental thereto; and also to keep the fences surrounding said premises, and all other improvements on said premises, in good condition of repair; to take care of and protect the crops while growing and to pick, clean, pack and prepare the same for market and to deliver the same unto the possession of said mortgagee; to permit the mortgagee at any time during the continuance hereof to enter upon the premises on which said property is situated and examine said property and, upon demand of said mortgagee, to make a written report to said mortgagee concerning the mortgaged property; to pay the mortgagee, or its successor, in the event suit be brought to foreclose this mortgage, an attorney fee of One Hundred Dollars ($100.00) and a further sum of five per cent (5%) of the amount due in the event that said action is prosecuted to judgment.

If the mortgagor fails to make any payment or perform any act which he is obligated to perform hereby, then the mortgagee, without demand, or notice to the mortgagor, or any successor in interest of the mortgagor, or any of [fol. 59] them, may make such payments or perform such acts and incur any liability or expend whatever amounts in its absolute discretion it may deem necessary therefore, and all sums incurred or expended by the mortgagee or its successor under the terms hereof shall immediately become due and payable by the mortgagor to the mortgagee, or its successor, when so incurred or expended and shall bear interest until paid at the rate of one per cent (1%) per month and shall be secured hereby.

If the mortgagor defaults in the performance of any covenant contained in this mortgage, or the payment of any obligation or indebtedness secured hereby, the mort--gee, without notice or demand, at any time, may take possession of said mortgaged property and repair, care for, harvest, lease or manage the said property and perfrom any act necessary to conserve the value or income thereof and to apply the proceeds in the manner as specified herein upon the sale of said property. And the mortgagee, or its successor, shall be entitled to the appointment of a receiver by a court of competent jurisdiction to assist it in performing and doing any of the acts hereinabove set

forth. All expenses incurred by the mortgagee in the taking possession of said property or in the performance of any of the acts hereinabove specified, including the expense of the appointment of a receiver, shall immediately become due and payable by the mortgagor to the mortgagee, or its successor, when so incurred, and shall bear interest at the rate of one per cent (1%) per month until paid, and shall be secured hereby.

If default is made in the prompt payment, when due, of any sums secured hereby or in the performance of any [fol. 60] promise contained herein, the mortgagee may declare all sums secured hereby immediately due and payable without demand or notice and said mortgagee may at once proceed to foreclose this mortgage by proceeding as provided for in the Code of Civil Procedure of the State of California, or it may, at its option, enter upon the premises where said mortgaged personal property may be and take possession thereof; and take such measures as to the mortgagee may be deemed necessary or proper for the care, protection or harvesting thereof and remove and/or sell and/or dispose of said mortgaged property as a pledge at either public or private sale, with or without notice (the said mortgagor hereby expressly waiving demand of performance, notice of sale and any advertisement of sale), and at said sale the mortgagee or its successor may become the purchaser and from the proceeds of sale retain all costs and charges incurred by it in the taking or sale of said property and in the care and protection thereof, including all reasonable attorney's fees incurred and may apply the balance toward the payment of all sums due said mortgagee and secured hereby and shall dispose of the surplus remaining as provided by law.

Mortgagor hereby expressly waives the provisions of Section 726 of the Code of Civil Procedure of the State of California, and agrees that mortgagee may sue to recover the indebtedness secured hereby without foreclosing this mortgage, it being understood that all remedies allowed the mortgagee under the law and under the terms of this mortgage are and shall be concurrent and cumulative.

[fol. 61] In Witness Whereof the said mortgagor has hereunto set the hand and seal of said mor-gagor the day and year first hereinabove written.

Andrea Cuccia. (Seal.) Minni Cucci. (Seal.)

STATE OF CALIFORNIA,
County of San Bernardino, ss:

Andrea Cuccia and Minni Cuccia, husband and wife, mortgagor in the foregoing mortgage named, and (Name of Officer:) C. A. Warren, (Officer's Title:) Manager, Ontario Branch, of the Bank of America National Trust and Savings Association, a corporation organized and existing and by virtue of the laws of the United States of America, the mortgagee in said mortgage named, each being duly sworn, each for himself doth depose and say: That the aforesaid mortgage is made in good faith, and without any design to hinder, delay or defraud any creditor or creditors.

Andrea Cuccia. Minni Cuccia. C. A. Warren.

Subscribed and sworn to before me this 14th day of April, 1933. J. B. Quayle, Notary Public in and for said County of San Bernardino, State of California.

[fol. 62] STATE OF CALIFORNIA,
County of San Bernardino, ss:

On this — day of April, in the year one thousand nine hundred and —, before me, J. B. Quayle, a Notary Public, in and for the County of San Bernardino, personally appeared Andrea Cuccia and Minni Cuccia, husband and wife, known to me to be the person- whose names are subscribed to the within instrument, and they duly acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my office in the said County of San Bernardino, the day and year in this certificate first above written.

J. B. Quayle, Notary Public in and for said County of San Bernardino, State of California.

Indexed (112).

When Recorded Mail to Ontario Branch Bank of America National Trust & Savings Association

Ontario

California

(Address of Branch)

Recorded Apr 15 1933 11:02 A M In Book 882 Page 272 Official Records San Bernardino County, Calif. Fulton G. Ferand County Recorder By A. R. Schultz Deputy I certify that I have correctly transcribed this document in above mentioned book M Smith Copyist M. Carroll 3.00
26

[fol. 63] Indexed 60.

Crop and Chattel Mortgage

(General Form)

Andrea Cuccia, Mortgagor,—to—Bank of America National Trust & Savings Association, Ontario, Mortgagee

Dated April 13, 1933.

Filed for record at the request of Bank of America National Trust & Savings Association 10:31 A M Book 891 O. R. Page 1 Official Records San Bernardino County, Calif. Fulton G. Ferand County Recorder By A. R. Schultz Deputy I hereby certify that I have correctly transcribed this document in above mentioned book M Smith M Carroll 3.10
28

Recross-examination.

By the Court:

My information is that in the matter pending before Referee Richards the reporter acted at the request of Mr. Steinmeyer.

[fol. 64] (Here was received in evidence, Conciliation Commissioner's Exhibit "A", reading as follows:

EXHIBIT "A"

Bank of America Trust and National Savings Association

Los Angeles Main Office

Los Angeles, California,
February 6, 1935.

Mr. D. W. Richards, Referee in Bankruptcy, San Bernardino, California.

In re Andrea Cuccia

No. 23615-M

DEAR SIR:

We have received notice of the first meeting of creditors of the above named bankrupt to be held on February 12, 1935.

We expect to appear at the meeting to examine the bankrupt and would like to have a shorthand reporter present in order to take the testimony. If it is necessary for us to make any arrangements for this other than the request will you kindly advise us.

Yours very truly, Hugo A. Steinmeyer, Assistant Attorney

HAS:F.

[fol. 65] ADAIR (resuming his testimony):

The indemnity fee of $18.25 is the amount established for San Bernardino County by the rules of court. Mr. Richards asked me to pay him that amount and it was all chargeable against this estate. I do not know how the Referee manages the expenses of his office.

Redirect examination.

By Creditor:

At the time I filed the petition and schedules for Mr. Cuccia I did not know he had previously executed a crop mortgage to the Bank of America. I don't know whether

the entry appearing on Schedule 2, at page 3, showing an indebtedness to Bank of America, Ontario, secured by deed of trust and also a chattel mortgage to Bank of America, Ontario, California, amount unknown, date unknown, no consideration, signed by deception, was within my knowledge at the time Mr. Cuccia filed his schedules. I don't know whether it is a fact that I received a copy of the summons and complaint in an action brought by the Bank of America to foreclose this crop and chattel mortgage prior to the time that I called the first meeting of creditors. The entries in the transcript of the docket of the case, showing an entry of August 29, complaint to foreclose crop and chattel mortgage, and also the entry on September 1, 1934, showing summons served by Bank of America, do not refresh my recollection as to whether or not I had notice that any crop mortgage had been executed by this debtor. I would not say that the entries in the docket are not correct. The entry was under my record and not Referee Richards. I wouldn't say the entry is incorrect because I don't know. Those records were my records though and maintained in my office and were my records of this case.

[fol. 66] STATEMENT BY THE COURT

Thereupon the court made a statement as follows:

"The Court: I don't care for any argument. In my judgment, there is no reason to discharge the Conciliation Commissioner, if his actions were in good faith and made for the purpose of conserving the estate. Someone would have had to conserve this property; otherwise it would have been wasted. There is no showing that he was improvident or that the expenses of maintaining the property were more than the bank itself would have had to pay if it had exercised any possession over the vineyard. Its lien under the chattel mortgage, assuming that the chattel mortgage is valid, which it isn't necessary to decide in this proceeding, would require, in order to preserve the lien and protect the rights of the bank, that the crop be properly attended to, cultivated, harvested and marketed. There is no showing that the bank could have done that for a less amount than the account of the Conciliation Commissioner shows that he expended. All of the items were expended for the purpose

of conserving the estate for whomever might ultimately be entitled to it, or for whoever was entitled to it. His activities were under the authority of the court, and even assuming that the position of the bank is legally correct, that the court had no authority, that is no reason to mulct the Conciliation Commissioner by imposing a surcharge upon him for attorney's expenses which were incurred in the manner stated.

The objections to the account are overruled and the account is settled and allowed."

[fol. 67] To which appellant then and there excepted.

The foregoing statement is hereby approved as being a true, complete, and properly prepared statement of the evidence on appeal, and may be approved by the Court as such.

Dated this 16th day of November, 1936.

Louis Ferrari, Edmund Nelson, Hugo A. Steinmeyer, Attorneys for Appellant, Bank of America National Trust and Savings Association. N. C. Peters, Attorneys for Appellee, Noah Adair.

ORDER APPROVING STATEMENT OF EVIDENCE

The foregoing statement is hereby approved as being a true, complete, and properly prepared statement of the evidence on appeal.

Dated this 17th day of November, 1936.

Paul J. McCormick, Judge.

[File endorsement omitted.]

[fol. 68] IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR ALLOWANCE OF APPEAL—Filed October 5, 1936

To the United States Circuit Court of Appeals for the Ninth Circuit and to the Honorable Judges Thereof:

The undersigned, Bank of America National Trust and Savings Association, a national banking association, feeling itself aggrieved by a certain order of the United States District Court for the Southern District of California, Cen-

tral Division, made and entered on the 14th day of September, 1936, wherein the said District Court overruled certain objections and exceptions of the undersigned to an accounting filed in the said proceedings by Noah Adair, Conciliation Commissioner in and for the County of San Bernardino, State of California, and settled and allowed the said accounting, does hereby petition this Honorable Court for the allowance of an appeal from the said order and from the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit and in support of its petition the undersigned alleges:

I

That on December 5, 1930, Andrea Cuccia executed his promissory note for the sum of $11,850.00 to petitioner, which note was secured by a deed of trust upon real property situated in the County of San Bernardino, State of California; that thereafter on April 13, 1933, as additional security for the indebtedness evidenced by the said promissory note Andrea Cuccia executed and delivered to petitioner a crop and chattel mortgage upon all the crops growing upon the said property during the years 1933 and 1934 [fol. 69] and thereafter until the said indebtedness was paid; that the said mortgage was duly acknowledged and recorded in the manner required by the laws of the State of California.

II

That on August 4, 1934, Andrea Cuccia filed a petition under Section 75 of the Bankruptcy Act in the United States District Court for the Southern District of California, Central Division, being proceeding No. 23615-M upon the records and files of the said Court; that said Andrea Cuccia failed to make a composition or extension with his creditors pursuant to the provisions of the said Statute and thereafter on January 7, 1935, filed an amended petition under Subsection (s) of Section 75 of the Bankruptcy Act and was thereupon adjudicated a bankrupt and the proceedings thereunder were duly referred to D. W. Richards, Referee in Bankruptcy in and for the County of San Bernardino, State of California; that thereafter the said proceedings were dismissed on October 14, 1935, by an order of the said District Court.

III

That during the month of September, 1934, Noah Adair, Conciliation Commissioner in and for the County of San Bernardino, took possession of and sold the crop of grapes growing upon the real property of the said Andrea Cuccia, which grapes were subject to the crop mortgage of petitioner, and received the sum of $1,437.37 upon the sale thereof; that said funds were deposited by the Conciliation Commissioner in a bank account in the name of himself and the debtor.

[fol. 70] IV

That thereafter, pursuant to an order of the said District Court made upon the application of petitioner, Noah Adair filed an accounting of the moneys received by him from the sale of the said crops and disbursed by him, which accounting was in words and figures as follows:

"In the District Court of the United States for the Southern District of California, Central Division

No. 23615-M

In the Matter of Andrea Cuccia, Debtor

September 26, 1934. An account in the name of Andrea Cuccia and Noah Adair was opened with the American National Bank, San Bernardino, California, and a deposite of $1437.37 was made	$1,437.37
September 26, 1934. Cash, labor for 20 men on ranch. Court order issued	340.00
October 1, 1934. Andrea Cuccia	59.33
October 30, 1934. Andrea Cuccia, 14 days labor court order issued	42.00
November 27, 1934. Andrew Cuccia, $15 living expense $20 filing fee under 75 (s) and $20 feed for horse. Court order	55.00
[fol. 71] December 20, 1934. Andrea Cuccia, $10.00 feed for horse and $10 living expense	20.00
January 22, 1935. Andrea Cuccia, $20, and labor on grove $144.00	164.00
January 22, 1935. D. W. Richards indemnity fee under Section 75 (s)	18.25

February 1, 1935. Andrea Cuccia, labor, 8 men, 11 day- each	264.00
February 15, 1935. Andrea Cuccia, labor	90.00
March 15, 1935. Andrea Cuccia, $45 labor; $20 hay and $10 living expense	75.00
April 19, 1935. Jos. E. Rich, Court reporter	22.50
April 19, 1935. Ralph W. Eckhardt, attorneys fee	50.00
April 19, 1935. Andrea Cuccia, 37 days work of hired men	111.00
May 11, 1935. Andrea Cuccia, su-pher for grapes	60.00
June 1, 1935. Andrea Cuccia, labor for two men working in grapes	30.00
Total	$1,401.08
Tax, etc.	.60
	$1,401.68

Balance in bank to date, $35.69.

Noah Adair."

[fol. 72]

V

That petitioner filed verified objections and exceptions to the said account in which it alleged in substance that the petitioner was the holder of a crop mortgage upon the said crops grown upon the real property of the debtor during the year 1934 and that the crops received by the Conciliation Commissioner were subject to the lien of the crop mortgage held by petitioner and that petitioner had no notice of any order made with respect to the disposition of any of the crop moneys that the orders referred to in the accounting were invalid.

VI

That Noah Adair, as Conciliation Commissioner, filed a verified answer to the objections and exceptions of petitioner to the said account in which he alleged in substance that the moneys expended by him were absolutely necessary for the care of the debtor's property and to provide for his living expenses and that said other expenditures were approved by D. W. Richards, Referee in Bankruptcy in and for the County of San Bernardino; said answer also alleged that this petitioner had not objected to the use of the pro-

ceeds of said crop in the care of the vineyard and expenses of administration and that this petitioner had never proven its claim upon the said crop mortgage because it had never filed the original or a copy of the said mortgage with its proof of secured debt in the bankruptcy proceedings.

VII

That a hearing was had on the said account and the objections thereto and the answer of Noah Adair, as Conciliation Commissioner to the objections on the 14th day of September, 1936, by the said United States District Court for [fol. 73] the Southern District of California, Central Division, and the said court thereupon made its order as follows:

"It is Ordered that the objections and exceptions to the account be overruled and that the same be settled and allowed. Exception noted in behalf of creditor."

Wherefore, the undersigned feeling aggrieved by the said order prays that an appeal therefrom may be allowed and that a citation issue, as provided by law, directed to Noah Adair citing and admonishing him to appear before the United States Circuit Court of Appeals for the Ninth Circuit to show cause, if any there be, why the errors in the above mentioned order should not be corrected and speedy justice should not be done to the parties in that behalf and that a transcript of the record and evidence of the proceedings in which the above mentioned order was made be sent, duly authenticated, to the said Circuit Court of Appeals pursuant to the rules of said Court in such cases made and provided.

Dated this 3rd day of October, 1936.

Bank of America National Trust and Savings Association, by A. G. Maurer, Vice President. Louis Ferrari, Edmund Nelson, Hugo A. Steinmeyer, Attorneys for Appellant.

[fol. 74] *Duly sworn to by A. G. Maurer. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 75] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed October 5, 1936

Comes now Bank of America National Trust and Savings Association and in support of its Petition for Allowance of Appeal from the order settling the account of Noah Adair, specifies the following errors in the said order:

1. The court erred in settling and allowing the said account for each of the following reasons:

(a) The proceeds of the sale of the crop belonged to the holder of the crop mortgage;

[fol. 76] (b) The Conciliation Commissioner was not a trustee in bankruptcy and had no right to the possession of the funds or to expend any part thereof;

(c) After the adjudication in bankruptcy and reference to referee, the Conciliation Commissioner had no jurisdiction over the proceedings;

(d) No trustee in bankruptcy was ever appointed;

(e) No valid order for the expenditure of any of the funds was ever made.

2. The court erred in overruling the objections and exceptions filed by petitioner to the said account.

Dated this 3rd of October, 1936.

Louis Ferrari, Edmund Nelson, Hugo A. Steinmeyer, Attorneys for Appellant.

[File endorsements omitted.]

[fol. 77] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—November 2, 1936

Upon consideration of the petition of Bank of America National Trust and Savings Association, a national bank-

ing association, filed October 5, 1936, for allowance of appeal herein under section 24b of the Bankruptcy Act, and of the assignments of error in support thereof, filed therewith, and by direction of the court,

[fol. 78] It is Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the District Court of the United States for the Southern District of California, Central Division, entered on the 14th day of September, 1936, be, and hereby is allowed, conditioned upon the giving of a cost bond in the sum of Two Hundred and Fifty Dollars ($250.00) with good and sufficient security within ten days from date.

I Hereby Certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this second day of November, A. D. 1936.

Paul P. O'Brien, Clerk, U. S. Circuit Court of Appeals for the Ninth *District*. (Seal.)

[Endorsed:] Due service and receipt of a copy of the within Order Allowing Appeal, together with a copy of the Petition for Allowance of Appeal, Assignment of Errors and Citation on Appeal is hereby acknowledged this 12 day of November, 1936. N. C. Peters attorney for appellee. Filed R. S. Zimmerman Clerk at 2 min. past 5 o'clock, Nov. 16, 1936 P. M. by R. B. Clifton, Deputy Clerk.

[fol. 79] In United States Circuit Court of Appeals

Notice of Filing Bond for Costs on Appeal

To Noah Adair and to N. C. Peters, His Attorney:

You, and Each of You, Will Please Take Notice that the bond for costs on appeal herein was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on November 6, 1936, duly executed and given by Fidelity and Deposit Company of Maryland.

Dated November 6, 1936.

Louis Ferrari, Edmund Nelson, Hugo A. Steinmeyer, Attorneys for Appellant.

[Endorsed:] Received copy of the within Notice of Filing Bond for Costs on Appeal this 12 day of November, 1936. N. C. Peters, attorney for appellee, Noah Adair. Filed R. S. Zimmerman Clerk at 1 min. past 5 o'clock Nov. 16, 1936 P. M. by R. B. Clifton, Deputy Clerk.

[fols. 80] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD

To the Clerk of the Above Entitled Court:

SIR:

Please prepare a certified transcript of the record in the above entitled matter including the following papers, documents and orders:

1. Debtor's Petition, Summary of Schedules, Page 3 of Schedule A-2 and Oath to Schedule A on page 6.
2. Petition for Order Directing Accounting.
3. Order Directing Accounting.
4. Account.
5. Objections and Exceptions to Account.
6. Conciliation Commissioner's Answer to Objections to Account.
7. Minute Order of the Hon. Paul J. McCormick, dated September 14, 1936.
8. Assignment of Errors.
9. Petition for Allowance of Appeal in the United States Circuit Court of Appeals for the Ninth Circuit.
10. Order Allowing Appeal made November 2, 1936, by the United States Circuit Court of Appeals for the Ninth Circuit.
11. Citation on Appeal.

12. Notice of filing Bond for Costs on Appeal.

13. Clerk's Certificate.

14. A statement of evidence that shall be approved herein and the order approving the statement of evidence and any stipulation for settlement of the statement of evidence that may be filed.

15. This Praecipe.

16. Please omit captions from all papers except the Petition for Order Directing Accounting and the Order Allowing Appeal.

17. Please omit all marks on the backs of papers except filing marks and admissions of service.

Dated: November 6, 1936.

LOUIS FERRARI
EDMUND NELSON
HUGO A. STEINMEYER
Attorneys for Appellant, Bank of America National Trust and Savings Association.

[Endorsed]: Received copy of the within Praecipe this 12 day of November, 1936 N. C. Peters, attorney for appellee, Noah Adair. Filed R. S. Zimmerman Clerk at 1 min. past 5 o'clock Nov. 16, 1936 P. M. by R. B. Clifton, Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume contatining 81 pages, numbered from 1 to 81 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; debtor's petition in proceedings under Section 75 of the Bankruptcy Act, omitting all schedule A except page 3 and oath to schedule A; petition for order directing accounting; order directing accounting; account; objections and exceptions to account; conciliation commissioner's answer to objection to account; order of September 14, 1936; statement of evidence; petition for appeal; assignment of errors and order allowing appeal in the United States Circuit Court of Appeals; notice of filing bond for costs on appeal, and praecipe.

I do Further Certify that the amount paid for printing the foregoing record on appeal is $97.45 and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $12.95 and that said amount has been paid me by the appellant herein.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this first day of December, in the year of Our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixty-first.

[Seal] R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By EDMUND L. SMITH,

Deputy.

[Endorsed]: Printed Transcript of Record. Filed Dec. 2, 1936. Paul P. O'Brien, Clerk.

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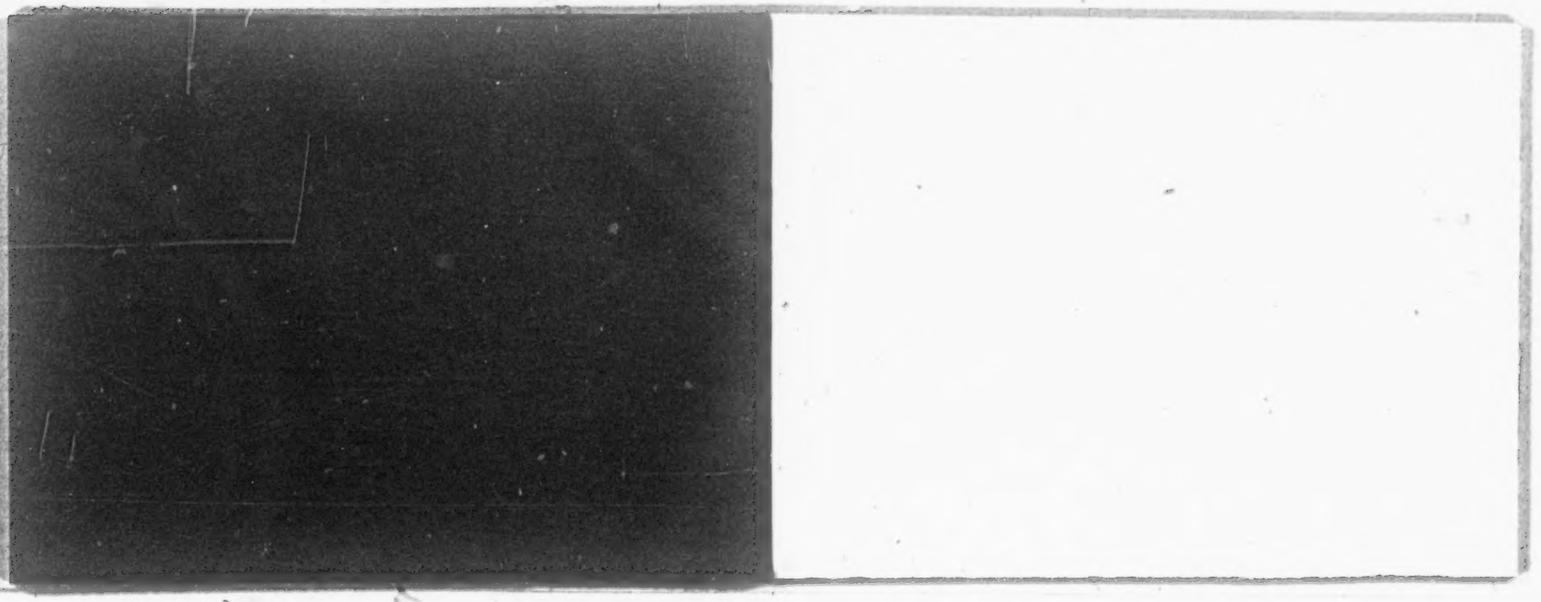

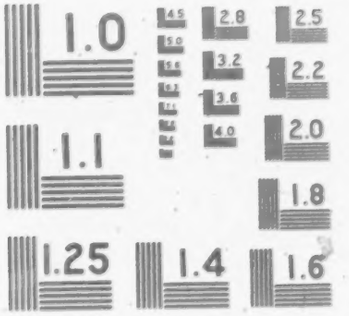

No. 8350

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF AMERICA, N. T. & S. A.,
Appellant,

vs.

NOAH ADAIR,
Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, April 23, 1937.

Before: Wilbur, Garrecht and Mathews, Circuit Judges.

[Title of Cause—No. 8350.]

ORDER OF SUBMISSION.

Ordered appeal in above cause argued by Mr. Hugo A. Steinmeyer, counsel for appellant, and submitted on brief on file on behalf of appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Monday, June 7, 1937.

Before: Wilbur, Denman and Mathews, Circuit Judges.

[Title of Cause—No. 8350.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Court and Cause.]

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

OPINION.

Before Wilbur, Garrecht and Mathews, Circuit Judges.

Mathews, Circuit Judge:

This appeal is from an order settling and allowing an account rendered by appellee in a proceeding[1] under §75 of the Bankruptcy Act (11 U. S. C. A. §203).[2]

Appellee is a conciliation commissioner for San Bernardino County, California, appointed under and pursuant to subsection (a) of §75 supra.[3] His

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[1]A detailed history of this proceeding will be found in Bank of America National Trust & Savings Ass'n v. Cuccia (C. C. A. 9),..... F.(2d) ....., decided May 4, 1937.

[2]Section 75, comprising subsections (a) to (r), inclusive, was added to the Bankruptcy Act by the Act of March 3, 1933, c. 204, 47 Stat. 1470-1473. Subsections (a) and (b) were amended by the Act of June 7, 1934, c. 424, §§8 and 9, 48 Stat. 925. Subsection (s) was added to §75 by the Frazier-Lemke Act of June 28, 1934, c. 869, 48 Stat. 1289-1291. Subsection (r) was amended by the Act of May 15, 1935, c. 114, §3, 49 Stat. 246. Subsections (b), (g), (k), (n), (p) and (s) were amended by the new Frazier-Lemke Act, August 28, 1935, c. 792, §§1-6, 49 Stat. 942, 945.

[3]Subsection (a) provides: "Within thirty days after the enactment of this Act every court of bankruptcy of which the jurisdiction or territory in-

powers and duties are, in general, those of a referee in bankruptcy. General Orders in Bankruptcy, Rule L, paragraph 11, 288 U. S. 644 (11 U. S. C. A. §53).[4] These powers and duties are specified in §§38 and 39 of the Bankruptcy Act, 30 Stat. 555 (11 U. S. C. A. §§66, 67)[5] and in Rule XII of the Gen-

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cludes a county or counties having an agricultural population . . . of five hundred or more farmers shall appoint one or more referees to be known as 'conciliation commissioners,' one such conciliation commissioner to be appointed for each county . . . ." 48 Stat. 925.

[4]By subsection (b) of §75, 47 Stat. 1470, the Supreme Court was authorized to make such general orders as it might find necessary properly to govern the administration of the office of conciliation commissioner and proceeds under §75. Pursuant to said authorization, the Supreme Court on April 17, 1933, adopted Rule L as an addition to the general orders in bankruptcy. 228 U. S. 621, 636, 641-644 (11 U. S. C. A. §53). Paragraph 11 of Rule L provides: "In so far as is consistent with the provisions of section 75 and of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy, shall apply to proceedings under said section . . . ." 288 U. S. 644.

[5]Section 38 provides: "Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to . . . (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided . . ." 30 Stat. 555.

eral Orders in Bankruptcy, 288 U. S. 623 (11 U. S. C. A. §53).[6]

On August 4, 1934, Andrea Cuccia, a farmer residing in San Bernardino County, California, proceeding under subsection (c)[7] of §75, filed his petition stating that he was insolvent or unable to meet his debts as they matured, and that he desired to effect a composition or extension of time to pay his debts. Thereupon, pursuant to paragraph 2 of Rule L,[8] the District Judge approved the petition and referred the matter to appellee.

Cuccia did not surrender his property to appellee, but continued in possession thereof. His property consisted of a tract of land in San Bernardino County and a crop of grapes growing thereon. Ap-

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[6]Rule XII provides: "The order referring a case to a referee shall name a day upon which the bankrupt or debtor shall attend before the referee . . . And thereafter all the proceedings, except such as are required by the Act or by these general orders to be had before the judge, shall be had before the referee." 288 U. S. 623.

[7]Subsection (c) provides: "At any time within five years after this section takes effect, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. The petition . . . of the farmer shall be accompanied by his schedules . . ." 47 Stat. 1471.

[8]Paragraph 2 provides: ". . . Upon the filing of the petition the judge shall enter an order either approving it as properly filed . . ., or dismissing it for want of jurisdiction. If the petition is approved, the case shall be referred . . . to a conciliation commissioner . . ." 288 U. S. 641.

pellant held a deed of trust, with power of sale, covering the land, and a crop mortgage[9] covering the crop, both of which were given to secure Cuccia's promissory note, held by appellant, for $11,850, with interest. Both had been duly recorded in San Bernardino County and were referred to in the schedules accompanying Cuccia's petition. Appellee, at the time this matter was referred to him and at all times thereafter, had actual as well as constructive knowledge of the deed and mortgage.

The mortgage obligated Cuccia to cultivate and harvest the crop, prepare it for market and, when so prepared, to deliver it to appellant, who, by the mortgage, was empowered to sell and dispose of the crop at the then market price and apply the proceeds to the payment of the indebtedness secured thereby. The mortgage provided that if Cuccia failed to perform any act which the mortgage obligated him to perform, appellant might perform such act and, in so doing, might expend such sums as it deemed necessary, and that all sums so expended should be immediately due and payable by Cuccia to appellant, and should be secured by the mortgage.

Prior to the filing of Cuccia's petition, his note had fallen due and had not been paid. Appellant had filed the notice required by §2924 of the Cali-

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[9]Section 2955 of the Civil Code of California provides: "Mortgages may be made upon all growing crops, including grapes and fruit . . ."

fornia Civil Code,[10] and the trustee named in the deed of trust had advertised the land for sale on October 3, 1934, but was prevented from making such sale by the filing of Cuccia's petition, which, under subsection (o)[11] of §75, precluded any such

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[10]Section 2924 provides: "... Where, in any transfer in trust ... of [any estate in real property] to secure the performance of an obligation, a power of sale is conferred upon the ... trustee, ... to be exercised after a breach of the obligation for which such ... transfer is a security, such power shall not be exercised ... until, (a) the trustee ... or beneficiary, shall first file for record, in the office of the recorder of the county wherein the ... trust property or some part thereof is situated, a notice identifying the ... deed of trust and giving the book and page where the same is recorded or a description of the ... trust property, and containing a statement that a breach of the obligation for which such ... transfer in trust is security has occurred, and of his election to sell or cause to be sold such property to satisfy the obligation; (b) not less than three months shall thereafter elapse; and (c) the ... trustee ... shall give notice of the time and place thereof ..."

[11]Subsection (o) provides: "Except upon petition made to and granted by the judge ... the following proceedings shall not be instituted, or if instituted ... shall not be maintained ... against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

"(1) Proceedings for any demand, debt, or account ...;

"(2) Proceedings for foreclosure of a mortgage on land ...;

. . . . . .

"(6) Seizure, distress, sale, or other proceedings ... under any ... chattel mortgage, ... crop payment agreement or mortgage." 47 Stat. 1472.

sale and precluded appellant from instituting or maintaining any action on Cuccia's note or any proceeding for the foreclosure or enforcement of its crop mortgage, except upon leave granted by the District Judge. No such leave appears to have been granted or applied for.

After filing his petition and after reference of this matter to appellee, Cuccia harvested the mortgaged crop above referred to and prepared it for market, but instead of being delivered to appellant, as required by the mortgage, the crop was marketed by appellee or by Cuccia under appellee's direction, and the proceeds, amounting to $1,437.37, were deposited in a bank in the name of Cuccia and appellee.

Having failed to obtain acceptance of his composition or extension proposal, Cuccia on January 7, 1935, filed an amended petition praying to be adjudged a bankrupt, pursuant to subsection (s)[12] of §75 (Frazier-Lemke Act of June 28, 1934, c. 869, 48 Stat. 1289-1291), and, on the same day, the District Judge made such adjudication and referred the matter to D. W. Richards, referee in bankruptcy. Thereafter, on October 14, 1935, this proceeding was dismissed. Bank of America National Trust & Savings Ass'n v. Cuccia (C. C. A. 9), ...F.(2d)

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[12]Subsection (s), as it then existed, provided as follows: "Any farmer failing to obtain the acceptance of a majority in number or amount of all creditors whose claims are affected by a composition or extension proposal . . . may amend his petition . . . asking to be adjudged a bankrupt . . ." 48 Stat. 1289.

....., decided May 4, 1937. With its subsequent reinstatement, we are not here concerned.

On October 17, 1935, the trustee named in the trust deed sold the land therein described and credited the proceeds on Cuccia's note. After this was done, there still remained an unpaid balance of $4,934.68. On February 6, 1936, appellant obtained an order requiring appellee to account for the proceeds of the mortgaged crop harvested by Cuccia in 1934. On February 17, 1936, appellee filed his account, showing receipt by him of $1,437.37 as proceeds of the mortgaged crop, disbursements therefrom amounting to $1,401.68, and a balance of $35.69 remaining in the bank.

Amounts shown to have been disbursed by appellee were $1,290.33 to Cuccia for labor performed and expenses incurred by Cuccia in cultivating and harvesting the mortgaged crop; $20 to Cuccia for payment of a "filing fee under §75(s);" $18.25 to D. W. Richards, Referee, as an "indemnity fee under §75(s);" $22.50 to Joseph E. Rich, court reporter, for taking testimony at a meeting of Cuccia's creditors held before the referee on February 14, 1935; $50 to Cuccia's attorney, Ralph W. Eckhardt, for services rendered to Cuccia in this proceeding; and 60 cents for "taxes, etc.," this item being otherwise unexplained. Appellant had no notice or knowledge of these disbursements.

Appellant objected to appellee's account, on the ground that appellant was entitled to the entire proceeds of the mortgaged crop, and that the disbursements made by appellee were made without

appellant's knowledge or consent and were unauthorized and improper. The District Court, after hearing, overruled appellant's objections and ordered that appellee's account be settled and allowed.

This order must be reversed. The entire proceeds of the mortgaged crop belonged to appellant. Appellant was under no obligation to cultivate or harvest the crop or to pay Cuccia for doing so. Cuccia was expressly obligated to do these things himself, at his own expense. No conciliation commissioner, trustee, referee, judge or court could impose this obligation on appellant. Appellee, therefore, could not be and was not authorized or empowered to pay Cuccia, with appellant's money, for performing this obligation. What appellee could or should have done had Cuccia failed to perform this obligation, it is unnecessary to decide, since there was, in fact, no such failure.

There was, if possible, even less excuse for disbursing appellant's money in payment of fees and costs said to have been expended or incurred in this proceeding. Cuccia and his creditors, including appellant, were, by subsection (b)[12] of §75, expressly exempted from paying any such fees or costs. Since these fees and costs were not chargeable to appel-

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[12]Subsection (b) provides: ". . . No fees, costs, or other charges shall be charged or taxed to any farmer or his creditors by any conciliation commissioner or with respect to any proceeding under this section, except as hereinbefore in this section provided . . ." 47 Stat. 1471. There is no exception covering any of the disbursements here complained of.

lant, appellee could not be and was not authorized or empowered to pay them with appellant's money.

Subsections (e)[14] and (n)[15] of §75, cited by appellee, do not warrant or justify the disbursements here complained of. In exercising the powers which these subsections confer, a court of bankruptcy may not ignore or disregard, but must recognize and protect, the rights of mortgagees. The District Court should have disallowed appellee's account and should have required appellee to pay to appellant the full sum of $1,437.37.

Order reversed and case remanded for further proceedings in conformity with this opinion.

[Endorsed]: Opinon. Filed Jun. 7, 1937. Paul P. O'Brien, Clerk.

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[14]Subsection (e) provides: "... After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors." 47 Stat. 1471.

[15]Subsection (n), as it existed when Cuccia's petition was filed, provided as follows: "The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition . . . was filed." 47 Stat. 1473.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 8350.

BANK OF AMERICA, N. T. & S. A.,

Appellant,

vs.

NOAH ADAIR,

Appellee.

DECREE.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, reversed, with costs in favor of the appellant and against the appellee, and that this cause be, and hereby is remanded to the said District Court for further proceedings in conformity with the opinion of this court.

It is Further Ordered, Adjudged, and Decreed by this Court, that the appellant recover against the appellee for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered June 7, 1937. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Excerpts from Proceedings of Monday, July 26, 1937.

Before: Garrecht, Denman and Mathews, Circuit Judges.

[Title of Cause—No. 8350.]

ORDER DENYING PETITION FOR REHEARING.

Upon consideration thereof, and by direction of the court, it is ordered that the petition of appellee and Amicus Curiae California Farm Debt Adjustment Commission, filed July 6, 1937, within time allowed therefor by rule of court, and by order of court, theretofore duly made, permitting such filing, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. Harold Sawyer, counsel for the appellee, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including August 30, 1937; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS A. GARRECHT,
United States Circuit Judge.

Dated: San Francisco, California, July 27, 1937.

[Endorsed]: Filed Jul 27 1937. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-nine (99) pages, numbered from and including 1 to and including 99, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of July A. D. 1937.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 100-1a] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION FOR DIMINUTION OF RECORD—Filed November 16, 1937

It is Hereby Stipulated by and between the parties to the above entitled proceedings that there may be filed in the above entitled proceedings as part of the record for consideration of the Court the documents hereinafter described now on file in the United States Circuit Court of Appeals for the Ninth Circuit in the Matter of Bank of America National Trust and Savings Association, a national banking association, appellant, vs. Andrea Cuccia, appellee, No. 8187 upon the records and files of said court; and

It is Further Stipulated that the said documents are necessary for a proper determination by this Court of the issues raised in the above entitled proceedings for the reason that they show the proceedings taken in the District Court of the United States in and for the Southern District of California, Central Division, in the Matter of [fol. 100-1b] Andrea Cuccia, Bankrupt, by which it is contended by petitioner that the original proceedings of Andrea Cuccia were reinstated; and

It is Further Stipulated that said documents, when certified and filed with the Clerk of the Above entitled Court, may be referred to in any further brief filed by either party hereto.

The documents hereinabove referred to to be embodied in a supplemental transcript are as follows:

1. Debtor's Petition in proceedings under Section 75 of the Bankruptcy Act, No. 23615-M;

2. Amended Debtor's Petition in proceedings under Section 75, subsection (s) of the Bankruptcy Act;

3. Petition of Creditor for Order Dismissing proceedings;

4. Notice of Motion to Dismiss;

5. Order Dismissing Proceedings;

6. Petition for Leave to Refile under Section 75 of the United States Bankruptcy Act and for Restraining Order, No. 27558-M; and

7. Restraining Order and Leave to Refile under Section 75 of the Bankruptcy Court.

Dated November 5th, 1937.

William Lemke, Harold M. Sawyer, Attorneys for [fol. 100-1c] Petitioner. William C. Day, Attorney for Respondent. Louis Ferrari, Edmund Nelson, Hugo A. Steinmeyer, of Counsel for Respondent.

[fol. 100-1d] [File endorsement omitted.]

[fol. 100-1e] Names and addresses of counsel omitted in printing.

[fol. 100-2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 27558-M

In the Matter of ANDREA CUCCIA, Bankrupt

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 23615

In the Matter of ANDREA CUCCIA, Bankrupt

DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75 OF THE BANKRUPTCY ACT—Filed August 6, 1934

To the Honorable Judges of the District Court of the United States for the Southern District of California, Central Division:

The Petition of Andrea Cuccia of R. 1, Etiwanda, California, in the County of San Bernardino and District *of* State of California, Respectfully Represents:

That he is personally bona fide engaged primarily in the farming operations (or that the principal part of his income is derived from farming operations) as follows: vin-yard: that such farming operations occur in the County

of San Bernardino, within said judicial district; and he is insolvent (or unable to meet his debts as they mature); and that he desires to effect a composition or extension of time to pay his debts under Section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A" and verified by your petitioner's oath, contains a full and true state-
[fol. 100-3] ment of all his debts and so far as it is possible to ascertain the names and places of residence of his creditors and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked "B" and verified by your petitioner's oat-, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore Your Petitioner Prays, That his petition may be approved by the Court and proceedings had in accordance with the provisions of said section.

Andrea Cuccia, Petitioner.

Duly sworn to by Andrea Cuccia. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 100-4] IN UNITED STATES DISTRICT COURT

AMENDED DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75 SUB-SECTION S OF THE BANKRUPTCY ACT—Filed January 7, 1935

To the Honorable Paul J. McCormick Judge of the United States District Court for the Southern District of California:

The petition of Andrea Cuccia of Etiwanda in the County of San Bernardino and District and State of California, Occupation, Trade, or Business of — Respectfully Represents: That he is personally bona fide engaged primarily in farming operations; (or that the principal part of his income is derived from farming operations), as follows: grape vineyard; that such farming operations occur in the

county (or counties) of San Bernardino, within said judicial district; that he is insolvent (or unable to meet his debts as they mature); that he has filed a petition (official form No. 65) under Section 75 of the acts of Congress relating to bankruptcy;

1* that he has failed to obtain acceptance of a majority in number and amount of all creditors whose claims were effected by a composition or extension proposal; and that he desires to obtain the benefit of Section 75 Sub-Section S of the acts of Congress relating to Bankruptcy.

2* that he is aggrieved by the composition or extension; and that he desires to obtain the benefit of Section 75 Sub-Section S of the acts of Congress relating to Bankruptcy.

That the schedule hereto annexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far — it is possible to ascertain) the names and places of residence of his cred- [fol. 100-5] itor-, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked "B", and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore Your Petitioner Prays, That he may be adjudged by the court to be a bankrupt in accordance with acts relating to Bankruptcy and all acts amendatory thereof.

Andrea Cuccia, Petitioner.

Duly sworn to by Andrea Cuccia. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 100-6] In United States District Court

Petition of Creditor for Order Dismissing Proceedings

To the Honorable Judges of the Above Entitled Court:

The petition of Bank of America National Trust and Savings Association respectfully shows:

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* Note.—Strike out Either Paragraph No. 1 or 2.

I

That Bank of America National Trust and Savings Association is now and has been at all times herein mentioned a national banking association duly organized and existing under and by virtue of the laws of the United States.

II

That the above named debtor is indebted to petitioner in the principal sum of $11,850.00, together with interest thereon at the rate of seven per cent per annum from September 21, 1933, to September 21, 1935, in the sum of $1,659.00 and interest thereafter accruing, evidenced by a promissory note dated December 5, 1930, due June 5, 1931, which indebtedness is secured by a deed of trust dated December 5, 1930, upon real property situated in the County of San Bernardino, State of California; that the above named debtor is likewise indebted to petitioner in the sum of approximately $1,000.00 representing advances made by petitioner in the payment of taxes, assessments and other sums in the care and preservation of the real property conveyed by the said deed of trust; that the total indebtedness of the above named debtor to petitioner is in excess of [fol. 100-7] $14,500.00 and constitutes a majority of the total indebtedness of the above named debtor as shown by his schedules on file in the above entitled proceedings; that the said indebtedness is likewise secured by a crop and chattel mortgage executed by the above named debtor, Andrea Cuccia, and Minnie Borgia Cuccia, his wife, covering all of the crops growing or to be grown upon the real property of the above named debtor in the County of San Bernardino, State of California, prior to the payment in full of the indebtedness secured by the said crop mortgage and a pledge of one share of the capital stock of the Etiwanda Water Company.

III

That on May 18, 1934, petitioner caused to be recorded in the office of the County Recorder of the County of San Bernardino, State of California, a notice of breach of the obligations secured by the said deed of trust and of its election to cause the property therein described to be sold to satisfy the said obligations, which said notice was recorded in Book 961 of Official Records at page 339.

IV

That on August 4, 1934, Andrea Cuccia, the above named debtor, filed his petition herein for an opportunity to make a composition or extension agreement with his creditors under and pursuant to section 75 of the Bankruptcy Act; that the said petition was referred to Noah Adair, Conciliation Commissioner in and for the County of San Bernardino, State of California, and the first meeting of creditors of said debtor was held on September 18, 1934, at the office of said Conciliation Commissioner.

[fol. 100-8] V

That said debtor was unable to reach any agreement of composition or extension with his creditors and thereafter on or about January 7, 1935, the said Andrea Cuccia filed an amended petition under Section 75 (s) of the Bankruptcy Act and the proceedings upon the said petition were thereupon referred to the Hon. D. W. Richards, Referee in Bankruptcy in and for the County of San Bernardino, State of California; that the first meeting of creditors of said debtor was held before the said Referee on February 12, 1935; that no trustee of the estate of the said debtor was appointed at the first meeting of creditors or at any time subsequent thereto; that petitioner herein, in the proceedings had and taken before the said Referee in Bankruptcy, filed objections in writing to the proceedings under Section 75 (s) of the Bankruptcy Act upon the ground that the said statute was unconstitutional and void and upon the further ground that the debtor had failed to file any good faith proposal for an extension or composition with his creditors at any time prior to the filing of the said amended petition under Section 75 (s) of the Bankruptcy Act; that evidence was had and taken by the said Referee upon the said objections and the matter submitted to the Referee and thereafter the Referee duly made findings of fact and conclusions of law upon the said objections and made and entered an order dismissing the above entitled proceedings; that a true and correct copy of the said order is hereto attached, marked Exhibit "A", hereby referred to and made a part hereof for all purposes; that thereafter on or about April 23, 1935, the above named debtor filed

a Petition for Review of the said order of the said Referee; that no hearing has ever been had upon the said petition for review.

[fol. 100-9]

VI

That the crop and chattel mortgage held by petitioner upon all of the crops growing upon the real property of the said debtor was a valid and proper crop mortgage upon the crops growing upon the said property during the year 1934; that during the month of October, 1934, the said debtor and Noah Adair, as Conciliation Commissioner in and for the County of San Bernardino, State of California, harvested all of the said crops growing upon the property and received the proceeds therefrom; that petitioner is informed and believes and upon such information and belief alleges that the said crops were sold for the sum of $1,500.00; that the said debtor and said Noah Adair, as Conciliation Commissioner, have failed and refused to account to petitioner for the proceeds of the said crops and petitioner is informed and believes and upon such information and belief alleges that the entire proceeds of said crops have been spent by the said debtor and the said Noah Adair, as Conciliation Commissioner.

VII

That the fair and reasonable value of the property securing the indebtedness to petitioner, as above alleged, does not exceed the sum of $15,000.00; that petitioner has refused and now refuses to enter into any further negotiations with the above named debtor for any composition or extension of the date of payment of the said indebtedness to petitioner.

VIII

That petitioner is informed and believes and upon such information and belief alleges that the crops growing upon the real property of the said debtor during the year 1935 are now being harvested by the said debtor and the said [fol. 100-10] Noah Adair, as Conciliation Commissioner in and for the County of San Bernardino; that the said crops are subject to the crop mortgage held by petitioner and petitioner is entitled to the proceeds thereof.

Wherefore, Petitioner p-ays that the above entitled proceedings be forthwith dismissed.

Bank of America National Trust and Savings Association, by A. G. Maurer, Vice President. Edmund Nelson, Hugo A. Steinmeyer, Attorneys for Petitioner.

Duly sworn to by A. G. Maurer. Jurat omitted in printing.

[fol. 100-11] In United States District Court, Southern District of California, Central Division

No. 23615–M.

In the Matter of Andrea Cuccia, Debtor

Order of Dismissal

This matter having come on for hearing before the Court at the first meeting of creditors on February 14, 1935, the Bank of America National Trust and Savings Association appearing by its attorney Hugo A. Steinmeyer and the debtor, Andrea Cuccia, appearing in person and by his attorney Ralph W. Eckhar-t, and the debtor having been examined and evidence both oral and documentary having been admitted and Bank of America National Trust and Savings Association, a creditor of the above named debtor, having made a motion to dismiss the above entitled proceeding and the matter having been submitted to the Court for its decision, and the Court being fully advised in the premises, and

It appearing to the Court and the Court finds that Andrea Cuccia, the above named debtor, did not at any time prior to the filing of the amended petition herein make any offer of composition or extension proposal in good faith to his creditors, it is therefore,

Ordered, Adjudged and Decreed that the above entitled proceedings be and the same hereby are dismissed.

Done in open Court this 16 day of April, 1935.

D. W. Richards, Referee in Bankruptcy.

[fol. 100-12] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MAILING—Filed October 4, 1935

Edna M. Mahler, being first duly sworn, deposes and says: I am a citizen of the United States, a resident of Los Angeles county, over the age of eighteen years and not a party to the above proceedings. On the 3 day of October, 1935, I served the attached Notice of Motion to Dismiss on Ralph W. Eckhardt, attorney for the above named debtor, by placing a true copy thereof in an envelope addressed to said attorney at his business address at 317 Anderson Building, San Bernardino, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California. There is delivery service by United States mail at the place so addressed and there is regular communication by mail between the place of mailing and the place so addressed.

Edna M. Mahler.

Subscribed and sworn to before me this 3rd day of October, 1935. Maude F. Leng, Notary Public in and for said County and State. (Seal.)

[File endorsement omitted.]

[fol. 100-13] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION TO DISMISS

To Andrea Cuccia, the Debtor Above Named, and to Ralph W. Eckhardt, His Attorney:

You, and Each of You, Will Please Take Notice that on Monday, the 14th day of October, 1935, at the hour of 10:00 A.M., or as soon thereafter as counsel may be heard, in the courtroom of the above entitled Court before the Honorable Paul J. McCormick, in room 400 Federal Building, Temple and Main Streets, Los Angeles, California, Bank of America National Trust and Savings Association, a creditor of the above named debtor will move the above entitled Court for an order dismissing the above entitled proceedings.

Said motion will be made and based upon all the papers on file in the above entitled proceedings and upon the petition of Bank of America National Trust and Savings Association for dismissal of the proceedings, a copy of which is served upon you herewith, and upon the ground that no composition or extension agreement can be had between the above named debtor and his creditors.

Dated September 30, 1935.

Edmund Nelson, Hugo A. Steinmeyer, Attorneys for Petitioner Bank of America National Trust and Savings Association.

[fol. 100-14] In United States District Court

Order Dismissing Proceedings—Filed October 14, 1935

The petition of Bank of America National Trust and Savings Association for an order dismissing the above entitled proceedings having come on for hearing on October 14, 1935, the petitioner being represented by Edmund Nelson and Hugo A. Steinmeyer, its attorneys, and the debtor above named being represented by Ralph W. Eckhar-t, his attorney, and evidence having been introduced, and it appearing to the Court that the allegations of the said petition are true and that the petitioner is entitled to relief prayed for therein, and the Court being fully advised in the premises, Now Therefore,

It is Hereby Ordered, Adjudged and Decreed that the above entitled proceedings be and the same hereby are dismissed.

Dated October 14th, 1935.

Paul J. McCormick, Judge.

[File endorsement omitted.]

(Endorsed:) Printed Supplemental Transcript of Record. Filed April 27, 1937. Paul P. O'Brien, Clerk.

[fol. 100-15] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 27558-M

In the Matter of ANDREA CUCCIA, Debtor.

PETITION FOR LEAVE TO REFILE UNDER SECTION 75 OF THE U. S. BANKRUPTCY ACT AND FOR RESTRAINING ORDER—Filed March 16, 1936

To the Honorable Paul J. McCormick, Judge U. S. District Court:

The petition of Andrea Cuccia, of Etiwanda, in the County of San Bernardino, California, respectfully represents:

That prior to the 11th day of October, 1935 your petitioner failed in his petition in proceedings for composition and extension to obtain an agreement between himself and his creditors and therefore filed his petition for reinstatement and adjudication as a bankrupt under Section 75 (s) of the Bankruptcy Act of the U. S., which said case was dismissed because the law was unconsti-tional.

That since the dismissal of the proceedings filed in Case No. 23615-M, and since the foreclosure sale of the property belonging to your petitioner hereinbefore mentioned in the new petition, your petitioner has discovered new facts and evidence which he believes will justify the Court in granting leave to file a new petition under Section 75 of said Act, said newly discovered facts and evidence hereinbefore mentioned are as follows:

[fol. 100-16] That the Federal Land Bank of Berkeley, a government loaning agency, has informed your petitioner that it will loan your petitioner $7,500 on the land hereinbefore mentioned.

That from the sale of a right of way through the property belonging to your petitioner herein the Bank of America National Trust and Savings Association and/or the California Lands, Inc., a subsidiary and/or holding company of the said Bank, received approximately $3,000 for said right of way, to which said sum your petitioner is entitled.

That there is on deposit for crops for 1935 raised on the land of your petitioner approximately $1600, which has been turned over to the Bank of America, to which your petitioner is entitled.

That if your petitioner is permitted to refile proceedings under Section 75 of the Bankruptcy Act at the present time, he will be in position to offer his creditors approximately 99% of the total indebtedness heretofore existing.

That subsequent to the sale and purchase of the land, proceedings were had that the creditor obtained judgment authorizing it to dispossess your petitioner and remove him from the property hereinbefore mentioned on the 16th day of March.

That your petitioner is still in possession of said premises.

That if permission is granted to your petitioner to refile a new petition under Section 75 of the Bankruptcy Act [fol. 100-17] a hearing of said petition could not be obtained before April 6, 1936, and that if your petitioner is not granted relief from the effect of the judgment permitting the creditor to dispossess him of the land until such time as a hearing on the new petition may be held your petitioner will suffer great and irreparable injury in this that his offer of composition as set out in said petition will be of no avail and he will lose his life savings and will have no place wherein to live or make a livelihood.

That if a hearing is granted, your petitioner is informed and believes that his offer will be satisfactory.

Wherefore, your petitioner prays:

(1) That the Court make its order granting your petitioner leave to file a new petition under Section 75 of the Bankruptcy Act and that a meeting of the creditors be held and hearing had to determine whether or not said composition as offered is acceptable.

(2) That until the time when such hearing under said petition may be had the Bank of America National Trust & Savings Association, its attorneys, agents and servants, and the Sheriff of San Bernardino County, California, and/or the California Lands, Inc., be ordered and restrain and forbidden from interferring with the possession of said property hereinabove described in said new petition, and

that no further proceedings shall be taken to dispossess your petitioner from his land.

Andrea Cuccia, Petitioner.

[fol. 100-18] *Duly sworn to by Andrea Cuccia. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 100-19] In United States District Court

Restraining Order and Leave to Refile Under Section 75 of the Bankruptcy Court—Filed March 16, 1936

Upon Reading and Filing of the verified petition of Andrea Cuccia, and it appearing to the satisfaction of the Court from said petition that the petitioner has discovered new facts, and

It further appearing to the Court that Andrea Cuccia is in position to effect a satisfactory composition with his creditors, and

It further appearing to the Court that unless a restraining order is granted as prayed for in said petition, the petitioner will suffer great and irreparable injury before the matter set out in the petition can be heard,

It is Therefore Ordered and Allowed that the petitioner, Andrea Cuccia, file new petition under Section 75 of the Bankruptcy Act, and that pending the hearing of said petition, Bank of America National Trust and Savings Association and/or the California Lands, Inc., a subsidiary and/or holding company of said Bank, its attorneys, agents and servants, and the Sheriff of San Bernardino County, California, are hereby restrained from interferring with Andrea Cuccia's possession of said property described in the petition under Section 75, and they are further enjoined and restrained from dispossessing and or evicting said petitioner until such time as the Court shall make its further order in the premises.

Paul J. McCormick, Judge U. S. District Court

Dated March 16, 1936 at 12:30 M.

[File endorsement omitted.]

(Endorsed:) Petition for leave to re-file under Sec. 75, and Restraining Order and Leave to Refile, Filed, as part of printed transcript of record, May 1, 1936. Paul P. O'Brien, Clerk.

[fol. 100-20] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8187

[Title omitted]

PRÆCIPE FOR RECORD—Filed November 6, 1937

To Paul P. O'Brien, Clerk of the Above Entitled Court:

SIR:

Please prepare and forward to Charles Elmore Cropley, Clerk of the Supreme Court of the United States, to be filed in the case of Noah Adair, Petitioner, vs. Bank of America National Trust and Savings Association, a National Banking Association, Respondent, October Term, 1937, No. 365, certified printed copies of the following portions of the transcript of record before the above entitled Court in the above entitled action:

1. Debtor's Petition in Proceedings Under Section 75 of the Bankruptcy Act, No. 23615-M;
2. Amended Debtor's Petition in Proceedings under Section 75, subsection (s) of the Bankruptcy Act;
[fol. 100-21] 3. Petition of Creditor for Order Dismissing Proceedings;
4. Notice of Motion to Dismiss;
5. Order Dismissing Proceedings;
6. Petition for Leave to Refile under Section 75 of the United States Bankruptcy Act and for Restraining Order, No. 27558-M; and
7. Restraining Order and Leave to Refile under Section 75 of the Bankruptcy Court.

Dated: This 3rd day of November, 1937.

William C. Day, Attorney for Bank of America National Trust and Savings Association. Louis Ferrari, Edmund Nelson, Hugo A. Steinmeyer, of Counsel.

Due service and receipt of a copy of the foregoing Præcipe is hereby admitted this 5th day of November, 1937.
William Lemke, Harold M. Sawyer, Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 100-22] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 100-23] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 18, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter: William Lemke. File No. 41,846. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 365. Noah Adair, petitioner, vs. Bank of America National Trust and Savings Association. Petition for writ of certiorari and exhibit thereto. Filed August 30, 1937. Term No. 365, O. T., 1937.

FILE COPY

Office - Supreme Court, U. S
FILED
AUG 30 1937
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1937

No. 365

NOAH ADAIR,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a National Banking Association),

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

WILLIAM LEMKE,
Fargo, North Dakota,
HAROLD M. SAWYER,
Balfour Building, San Francisco, California,
Attorneys for Petitioner.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1937

No.

NOAH ADAIR,
Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a National Banking Association),
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Noah Adair respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to

review a decree of that Court pronounced on June 7, 1937, not yet officially reported. (R. 87-97.) The said Court, by its decree, reverses an order of the District Court of the United States for the Southern District of California, Central Division, overruling objections and exceptions of Respondent to an accounting filed in that Court by Petitioner as Conciliation Commissioner in and for the County of San Bernardino, State of California, and settling and allowing the said accounting. The order of the District Court from which the appeal was taken is not officially reported, but is found in the Transcript of Record at page 31. Within the time provided by law, Petitioner made application for a rehearing, which was denied by the United States Circuit Court of Appeals for the Ninth Circuit July 26, 1937 (R. 98), and pursuant to the application of Petitioner, under Rule 32 of said Court, issuance of mandate was stayed to and including August 30, 1937, and in the event this petition for a writ of certiorari is docketed in the Clerk's Office of the Supreme Court of the United States on or before August 30, 1937, then the mandate is to be stayed until after this Court passes upon this petition.

NATURE OF CASE AND QUESTIONS INVOLVED.

The order of the District Court from which the appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit was made in the course of proceedings initiated by Cuccia, a farm debtor, under the provisions of Section 75 of the National Bankruptcy Act of 1898, as amended. (11

U. S. C. A. Sec. 203.) In accordance with the terms of that statute, Cuccia filed his petition for a composition or extension of time to pay his debts August 6, 1936. (R. 4-9.) This petition was approved by the Court and the proceedings were referred to Petitioner, Noah Adair, Conciliation Commissioner in and for the County of San Bernardino, of the State of California. (R. 13, par. V.)

Thereafter the said Cuccia having failed to make any agreement of composition or extension with his creditors, on the 7th day of January, 1935, filed a petition under the provisions of Section 75 (s) of the Bankruptcy Act as the same existed at that time, whereupon he was adjudged a bankrupt and the proceedings upon the said amended petition were referred to D. W. Richards, as Referee in Bankruptcy in and for the County of San Bernardino, State of California. (R. 13, par. VI.)

On May 27, 1935, the Supreme Court of the United States, in the case of *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, held subsection (s) of Section 75 unconstitutional and void.

On September 26, 1934, Petitioner opened an account in the name of Cuccia and Petitioner with the American National Bank, San Bernardino, California, with a deposit of $1437.37. (R. 17.) This amount represented the proceeds of the sale of a crop, a mortgage on which was held by respondent. (Opinion of the Circuit Court of Appeals, R. 94.)

From September 26, 1934, until June 1, 1935, Petitioner disbursed to Cuccia a total of $1290.33 for labor performed and expenses incurred by Cuccia in

cultivating and harvesting the mortgaged crop. (R. 17, 18. Opinion of Circuit Court of Appeals, R. 94.)

On October 14, 1935, all of the proceedings instituted by Cuccia were dismissed. (R. 13.) It is apparent that the proceedings were dismissed because of the declaration by the Supreme Court that subsection (s) of Section 75, in its original form, was unconstitutional. However, on August 28, 1935, Congress amended Section 75 of the Bankruptcy Act by changing, in respects not material to this case, various subsections thereof, and by enacting a new subsection (s) to take the place of the one declared unconstitutional. (11 U. S. C. A. Sec. 203.)

From the chronological history of this case, as stated thus far, it is apparent that all of the disbursements made by Petitioner were made prior to the order of dismissal of October 14, 1935. It is also apparent that of the total amount disbursed by Petitioner to Cuccia, $516.33 was disbursed prior to the amendment of the petition by Cuccia on January 7, 1935, his adjudication as a bankrupt thereunder, and reference of the proceedings to D. W. Richards, as Referee in Bankruptcy, pursuant thereto. (R. 17.)

Subsequently, Cuccia refiled under the provisions of Section 75, and particularly subsection (s) thereof, as amended and reenacted by Congress on August 28, 1935. Under paragraph 5 of subsection (s) of Section 75, as amended and reenacted, it is provided that all cases which have been dismissed by any conciliation commissioner, referee, or Court because of the Supreme Court's decision holding the former subsection (s) unconstitutional, shall be promptly rein-

stated, without any additional filing fees or charges. (11 U. S. C. A. Sec. 203, as amended August 28, 1935.)

The record herein does not show the details of the reinstatement, but such reinstatement appears by necessary inference from the opinion of the Circuit Court of Appeals, wherein it is stated that "with its subsequent reinstatement we are not here concerned". (R. 94.)

The account of Petitioner was settled and allowed by the District Court on September 14, 1936. (R. 31, 32.) The Circuit Court of Appeals for the Ninth Circuit, however, reversed the order of allowance and charged Petitioner with personal responsibility and liability for the gross proceeds derived from the sale of the crop, to-wit, the sum of $1437.37. (R. 96.)

It does not appear from the record that Petitioner was ever authorized by any order of Court to make the disbursements to Cuccia for labor performed and expenses incurred by Cuccia in cultivating and harvesting the mortgaged crop. But the decision of the Circuit Court of Appeals does not depend upon the absence of an order. That Court said in its opinion, "no conciliation commissioner, trustee, referee, judge, or court could impose this obligation on appellant. Appellee *could not be* and was not authorized to pay Cuccia with appellant's money for performing this obligation". (i. e., the cost of cultivating and harvesting the crop.) (R. 95. Italics ours.)

The following questions are presented by the record:

First. Upon this record, the ostensible question is to what extent a conciliation commissioner, who partakes of the character of a referee in

bankruptcy, is personally liable for expenditures made for the cultivation and harvesting of a crop pursuant to the presumed authority of an unconstitutional statute. The record shows, however, without going into detail, that there was a subsequent reinstatement of the proceedings after they were dismissed because of the unconstitutionality of the original subsection (s) of Section 75 of the Bankruptcy Act. (R. 94.)

In the amendment to Section 75 and the reenactment, in modified form, of subsection (s) thereof, adopted by Congress August 28, 1935, there was in the 5th paragraph of subsection (s) specific provision for the reinstatement of previously dismissed petitions. Reinstatement is tantamount to a restoration of the original proceedings *ab initio*. Can, therefore, this Court do complete justice between the parties without considering the effect of reinstatement, and if the record of reinstatement is insufficient, should not the Circuit Court of Appeals, sitting as a Court of Equity, which is essentially the function of a Bankruptcy Court, have required amendment of the record to show the proceedings resulting in reinstatement?

Second. In view of the fact that Cuccia's petition was reinstated under the terms and provisions of subsection (s) of Section 75 of the Bankruptcy Act, thus validating the proceedings *ab initio*, can it be said that Petitioner's disbursements were made pursuant to the alleged authority of an unconstitutional statute?

Third. Is not a Court officer protected from personal liability in making disbursements under authority of a constitutional statute?

Fourth. In view of the fact that the disbursements in question were absolutely necessary for the protection of the crop, is not the case similar to that of one who creates a fund and consequently is entitled to be reimbursed for the expense involved in its creation?

Fifth. In a case where a farm debtor has filed a petition under Section 75 of the Bankruptcy Act, subsections (a) to (r) inclusive, for composition or extension of time within which to pay his debts; has been adjudicated a bankrupt under the provisions of subsection (s) as enacted by Congress August 28, 1935, may a conciliation commissioner, to whom the matter has been referred, either before or after the adjudication of bankruptcy, expend any part of the proceeds derived from the sale of a mortgaged crop to defray the expense necessary for the production of that crop?

THE REASONS RELIED UPON FOR ALLOWANCE OF A WRIT OF CERTIORARI.

This Court has decided in the case of *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia,* not yet officially reported, but found in Advance Opinions, Vol. 81, Pamphlet No. 11, page 487, L. E., that the situation of the farmer operating under subsection (s) of Section 75 is closely anal-

ogous to that of receivership. Specifically, the language of the Court is:

> "The farmer's proceeding in bankruptcy for rehabilitation resembles that of a corporation for reorganization."
>
> (Advance Sheets, Vol. 81, p. 495, L. E.)

In the same decision, this Court has upheld the fixing of a rental under the terms of subsection (s) of Section 75 and the application thereof to the payment of necessary expenses of operation, such as taxes, upkeep, etc. The Circuit Court of Appeals for the Ninth Circuit has, however, by its decision, held that the entire gross operating revenue of Cuccia's farm must be paid to the secured creditor. This decision, therefore, precludes, in any case where the entire operating revenue of a farm consists of the proceeds to be derived from mortgaged crops, any application of the beneficent and remedial provisions of Section 75 of the Bankruptcy Act and particularly of subsection (s) thereof. If the crop mortgagee is entitled to the gross proceeds, without deduction of the expenses necessarily involved in the production of the crop which yields these proceeds, it is obvious that not only can no rental be fixed, but that the farm cannot be operated, where its entire revenue is derived from the sale of the crops produced. Such a rule is abhorrent to all of the principles involved in receivership practice.

In the *Wright* case, supra, this Court had before it no question involving the rights and priorities of a crop mortgagee, and it therefore has not specifically passed upon the issue presented by this record. The

decision, however, of the United States Circuit Court of Appeals is in direct opposition to the necessary implications of the decision of this Court in the *Wright* case, supra. It is submitted that if this decision stands, the hope of financial rehabilitation extended to the distressed farmer by subsection (s) of Section 75 will be largely, if not entirely, destroyed, and further, that it will in the future be impossible to induce responsible and competent persons to become conciliation commissioners because of the handicaps and perils resulting from this decision.

BRIEF.

A brief in support of this petition is filed herewith.

PRAYER.

Wherefore, your Petitioner prays that this Honorable Court will be pleased to issue its writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and all proceedings in the case numbered and entitled in said Court: "No. 8350, In the Matter of Bank of America National Trust and Savings Association (a National Banking Association), Appellant, v. Noah Adair, Appellee", to the end that said case may be reviewed and determined by this Court as provided by law, and that said judgment of said United States Circuit Court of Appeals for the Ninth

Circuit may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

Dated, San Francisco, California,
August 20, 1937.

WILLIAM LEMKE,
HAROLD M. SAWYER,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

State of California,
City and County of San Francisco.—ss.

Harold M. Sawyer, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the Petitioner in the above and foregoing cause; that he has read and considered the foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, and is familiar with the contents of such petition and brief, and, in affiant's judgment, such petition is well founded; that this petition is presented in good faith, and the same is not interposed for delay.

HAROLD M. SAWYER.

Subscribed and sworn to before me this 20th day of August, 1937.

(Seal) LULU P. LOVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1937

No.

NOAH ADAIR,
Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a National Banking Association),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

No opinion appears to have been written or published by the District Court upon the order settling and allowing Petitioner's accounts, but an oral opinion appears in the record. (R. 66.) Upon appeal from the order of the District Court to the United States Circuit Court of Appeals for the Ninth Circuit, the latter Court wrote an opinion, not yet officially reported,

but found at page 88 of the transcript of record. Petition for rehearing was denied by the Circuit Court of Appeals, without opinion. (R. 98.)

II.

JURISDICTION.

1. The date of the decree sought to be reviewed is June 7, 1937, and the date of the denial of the petition for rehearing is July 26, 1937. The mandate has been stayed to and including August 30, 1937, and in the event the petition for a writ of certiorari herein is docketed in the Clerk's Office of this Court on or before said date, then the mandate of the Circuit Court of Appeals is to be stayed until after this Court has passed upon the petition. (R. 99.)

2. Your Petitioner submits that this Honorable Court should review the decision of the Circuit Court of Appeals for the reasons relied upon in the foregoing petition, pages 7 to 9 thereof, which, in the interests of brevity, are not here repeated.

3. The jurisdiction of this Honorable Court is invoked under the provisions of the Judicial Code, Section 240, as amended by the Act of February 15, 1925; 43 Stat. 938; 28 U. S. C. A., Section 347, subdivision (a) thereof, wherein it is provided that it shall be competent for the Supreme Court of the United States, upon the petition of any party to any civil case, to require by certiorari, either before or after a judgment or decree by a Circuit Court of Appeals, that the cause be certified to the Supreme Court for

determination by it, with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal. The Act of Congress involved in these proceedings is Section 75 of the Bankruptcy Act of 1898, as amended, and particularly the amendment to said Section 75 adopted by Congress August 28, 1935.

Section 240 of the Judicial Code and Section 75 of the Bankruptcy Act of 1898, as amended, may be found in full in the appendix to this brief.

4. The following cases are believed to sustain the jurisdiction of this Honorable Court:

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555; 79 L. E. 1593;

Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, Vol. 81, Pamphlet No. 11, page 487, L. E.

In both of these cases certiorari was granted by this Honorable Court to review decrees of the Circuit Court of Appeals involving the validity and construction of Section 75 of the National Bankruptcy Act of 1898.

III.

STATEMENT OF THE CASE.

A summary statement of the case appears in the petition filed herewith, but for the sake of completeness and in order to comply with subsection (d) of Section 2 of Rule 27 of this Court, the following statement is made:

The farm debtor Cuccia filed his petition for a composition or extension of time to pay his debts pursuant to the provisions of Section 75 of the National Bankruptcy Act of 1898, subsections (a) to (r), both inclusive, August 6, 1936. (R. 4-9.) This petition was approved by the Court and the proceedings were referred to Petitioner, Noah Adair, Conciliation Commissioner in and for the County of San Bernardino, of the State of California. (R. 13, par. V.)

Thereafter Cuccia, having failed to make any agreement of composition or extension with his creditors, on the 7th day of January, 1935, filed a petition under the provisions of Section 75 (s) of the Bankruptcy Act as the same existed at that time, whereupon he was adjudged a bankrupt and the proceedings upon the said amended petition were referred to D. W. Richards, as Referee in Bankruptcy in and for the County of San Bernardino, State of California. (R. 13, par. VI.)

On May 27, 1935, this Honorable Court, in the case of *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, held subsection (s) of Section 75 unconstitutional and void.

At the time Cuccia filed his original petition, and also when he filed his amended petition and was adjudged a bankrupt, he was the owner of certain ranch property and had executed a deed of trust of this property to Corporation of America, a corporation, as trustee, to secure an obligation of $11,850.00, evidenced by a promissory note made, executed, and delivered to Bank of America National Trust and Sav-

ings Association on December 5, 1930. The latter was named as beneficiary in the deed of trust. (R. 10-12.)

Thereafter, as additional security for the payment of said promissory note, Cuccia made, executed, and delivered to Bank of America National Trust and Savings Association a crop and chattel mortgage dated April 13, 1933, wherein Cuccia mortgaged to the said bank all crops of whatsoever kind or character, including that certain crop of grapes of all varieties then planted or growing, or that may during the years of 1933 and 1934 be planted or grown, or that may be planted or grown prior to the payment in full of the indebtedness secured by said crop and chattel mortgage upon the real property described in the deed of trust. (R. 12.)

Both the deed of trust and crop mortgage were duly recorded.

The crop mortgage, among other things, obligated Cuccia

> "to attend to, care for, cultivate, irrigate and protect said crop or crops hereinabove mentioned and described, in a good, farmerlike manner, and according to the most approved methods of farming, until the same shall be ready for harvesting, and then to harvest and prepare said crop or crops for market, and when said crop or crops are so prepared, to deliver said crop or crops to the mortgagee, who may sell and dispose of the said crops at the then market price and apply the proceeds of said sale toward payment of the notes and obligations secured thereby," (R. 57, 58.)

The mortgage further provided that if Cuccia failed to perform any act which the mortgage obligated him to perform, the mortgagee might perform such act and, in so doing, might expend such sums as it deemed necessary, and that all sums so expended should be immediately due and payable by Cuccia to the mortgagee, and should be secured by the mortgage. (R. 59.)

After the proceedings had been referred to Petitioner, Cuccia harvested the mortgaged crop above referred to and prepared it for market. The crop was not delivered to the mortgagee bank, but was marketed by Petitioner, or by Cuccia under Petitioner's direction, and the gross proceeds, amounting to $1437.37, were deposited in American National Bank, San Bernardino, California, in the joint name of Cuccia and Petitioner. (R. 17. Opinion of Circuit Court of Appeals, R. 93.)

From September 26, 1934, until June 1, 1935, Petitioner disbursed to Cuccia a total of $1290.33 for labor performed and expenses incurred by Cuccia in cultivating and harvesting the mortgaged crop. (R. 17, 18. Opinion of Circuit Court of Appeals, R. 94.)

The production of crops and the moneys produced from the sale thereof constituted the sole operating revenue derived from Cuccia's ranch. This statement does not expressly appear in the record, but it was asserted in Petitioner's opening brief on page 4 in the Court below, and the assertion has never been challenged.

On October 14, 1935, the proceedings instituted by Cuccia were dismissed. (R. 13.) It is apparent that the proceedings were dismissed because of the declaration by the Supreme Court that subsection (s) of Section 75, in its original form, was unconstitutional. However, on August 28, 1935, Congress amended Section 75 of the Bankruptcy Act by changing, in respects not material to this case, various subsections thereof, and by enacting a new subsection (s) to take the place of the one declared unconstitutional. (11 U. S. C. A., Sec. 203.)

On September 14, 1936, Petitioner's account was settled and allowed and he was permitted to take credit for the $1290.33 disbursed to Cuccia, as aforesaid. (R. 31, 32.)

From the chronological history of the case, as stated thus far, it is apparent that all of the disbursements made by Petitioner were made prior to the order of dismissal of October 14, 1935. It is also apparent that of the total amount disbursed by Petitioner to Cuccia, $516.33 was disbursed prior to the amendment of the petition by Cuccia on January 7, 1935, his adjudication as a bankrupt thereunder, and reference of the proceedings to D. W. Richards, as Referee in Bankruptcy, pursuant thereto. (R. 17.)

Prior to the order of September 14, 1936, settling and allowing Petitioner's account, Cuccia on March 16, 1936, filed a petition for reinstatement under the terms and provisions of paragraph 5 of subsection (s) as reenacted by Congress on August 28, 1935, and on the same day the Court entered an order reinstat-

ing the proceedings which had previously been dismissed on October 14, 1935. (*Bank of America National Trust and Savings Association v. Cuccia*, 90 Fed. (2d) 100, at 101.) The Court below took the position that it was not concerned with this reinstatement. (R. 94.)

On June 7, 1937, the Circuit Court of Appeals reversed the order settling and allowing Petitioner's accounts and charged him with personal liability for the payment to Bank of America National Trust and Savings Association of the full sum of $1437.37, being the gross proceeds derived from the sale of the mortgaged crop. (R. 96.)

IV.

SPECIFICATION OF ERRORS TO BE URGED.

1. The Circuit Court of Appeals for the Ninth Circuit erred in completely disregarding the effect of the order made by the District Court on March 16, 1936, reinstating Cuccia's proceedings pursuant to the terms of paragraph 5 of subsection (s) as reenacted by Congress on August 28, 1935, and in failing to require amendment of record to show such proceedings if, in the opinion of the Court, the record before it was insufficient for such purpose.

2. The Circuit Court of Appeals for the Ninth Circuit erred in holding that Petitioner is personally liable for disbursements made by him pursuant to the authority of a constitutional statute and in his capacity as Conciliation Commissioner for the County

of San Bernardino, State of California, and officer of the Court.

3. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the cost of cultivating and harvesting the mortgaged crop was not a proper charge against the gross proceeds derived from the sale of the crop.

4. The Circuit Court of Appeals for the Ninth Circuit erred in holding, contrary to the universal view, that the cost of creating a fund should not be charged against the fund.

5. The Circuit Court of Appeals for the Ninth Circuit erred in holding that in a case where a farm debtor has filed a petition under Section 75 of the Bankruptcy Act, subsections (a) to (r) inclusive, for composition or extension of time within which to pay his debts; has been adjudicated a bankrupt under the provisions of subsection (s) as enacted by Congress on August 28, 1935, a conciliation commissioner, to whom the matter has been referred, either before or after the adjudication of bankruptcy, may not expend any part of the proceeds derived from the sale of a mortgaged crop to defray the expense necessary for the production of that crop, and that if he does so, he is personally liable to the crop mortgagee for the expenditure.

V.

SUMMARY OF ARGUMENT.

1. The order of the District Court of March 16, 1936, reinstating the proceedings originally filed by Cuccia, validated those proceedings *ab initio*. And although the disbursements might originally have been made by Petitioner pursuant to the supposed authority of an Act subsequently declared unconstitutional, nevertheless the reinstatement made pursuant to a subsequent constitutional Act validates and justifies the disbursements.

2. Petitioner was a referee in bankruptcy, known as a conciliation commissioner. He was an officer of the Court and, as such, should not be held personally liable for expenditures made under the authority of constitutional legislation.

3. The situation of a distressed farm debtor who has availed himself of the procedure afforded by Section 75 of the National Bankruptcy Act has been characterized by this Honorable Court as analogous to that of receivership. The cost of cultivating and harvesting the mortgaged crop was a legitimate and necessary expense, and therefore, under settled principles of receivership practices, was a proper charge against the gross proceeds derived from the sale of the crop.

4. Wherever a fund is created for the benefit of those who did not participate in the creation of the fund, the necessary expense involved is a proper charge against the fund.

5. Section 75, in its entirety, contemplates the financial rehabilitation of the farm debtor by leaving him in possession of his property under the supervision and control of the Court, freed from the hampering restrictions of adversary action by his creditors, to the end that he may, during the period of rehabilitation, have an opportunity to work out of his difficulties by gradually reducing his obligations. Like any other receivership, the plan is entirely unworkable unless a part, at least, of the gross operating revenue can be used to defray the cost of operation. The period of rehabilitation is a "breathing space" and the essence of a breathing space is opportunity to breathe; if, therefore, the supply of oxygen is cut off at the very start, the breathing space becomes nothing but a cruel illusion.

VI.

ARGUMENT.

FIRST SPECIFICATION OF ERROR.

THE QUESTION PRESENTED IN THIS CASE CANNOT FAIRLY AND EQUITABLY BE DETERMINED WITHOUT TAKING INTO CONSIDERATION THE REINSTATEMENT OF THE PROCEEDINGS OF CUCCIA UNDER SECTION 75 OF THE NATIONAL BANKRUPTCY ACT, ACCOMPLISHED BY THE ORDER OF REINSTATEMENT MADE MARCH 16, 1936.

Section 75 of the Bankruptcy Act, in its original form, embraced only subsections (a) to (r) inclusive. It was passed March 3, 1933. (47 Stat. at L. 1467, Chap. 204.) The original subsection (s) was no part of it, and was not added until June 28, 1934, at which

time this subsection, popularly known as the Frazier-Lemke Act, was passed. (48 Stat. at L. 1289, Chap. 869.) The original subsection (s) was an essential part of the scheme of farm debtor rehabilitation. Before this subsection was added to the statute, it provided merely for an opportunity for the farmer to endeavor to effect a composition of his debts or extension of time within which to pay them. No relief was afforded for the situation where the composition or extension could not be effected. It was readily seen that the plan of rehabilitation would have to be implemented with the creation of something analogous to a receivership for the farm debtor. Under these circumstances, the original Frazier-Lemke Act was passed.

Ultimately, this Act was declared unconstitutional by this Honorable Court in the *Radford* case, supra. After careful consideration of the views of this Court expressed in the *Radford* case, Congress on August 28, 1935, amended, in some particulars not material to this discussion, portions of Section 75 as originally enacted, and reenacted a new subsection (s) to take the place of the original Frazier-Lemke Act.

During the interval of time that elapsed between the declaration of unconstitutionality in the *Radford* case and the passage of the new subsection (s) on August 28, 1935, there had been wholesale dismissals of proceedings taken pursuant to the supposed authority of the original Frazier-Lemke Act. Accordingly, Congress made provision for this situation, at least in so far as was possible where no vested rights

had accrued by reason of foreclosure sales conducted in the interim. The provision is found in the 5th paragraph of the new subsection (s) and is to the effect that "all cases that have been dismissed by any conciliation commissioner, referee, or Court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges",

In other words, the intent of Congress was to bridge over the gap between the date of the *Radford* decision and the date of the new Act, so that where no intervening vested rights had accrued in the meantime, there should be unbroken continuity from the time when the farm debtor filed his original petition praying for a composition or extension.

The case, in its broad aspects, should be treated as if the proceedings had been continuous from inception and there had been no dismissal on October 14, 1935, following the decision in the *Radford* case.

It may be urged that the issue is far simpler and presents nothing but a case of expenditures made under the presumed authority of an unconstitutional Act, and that therefore the Circuit Court of Appeals was right in saying that it was not concerned with the proceedings for reinstatement. This, however, is too narrow an approach. Prior to the order of the District Court of September 14, 1936, settling and allowing Petitioner's accounts, the proceedings had already been reinstated by the order of the same District Court of March 16, 1936. It is true that these reinstatement proceedings are not set forth in the

record which was before the Circuit Court of Appeals, but nevertheless, prior to the decision of that Court of June 7, 1937, reversing the District Court's order settling and allowing the Petitioner's accounts, the same Circuit Court of Appeals on May 4, 1937, rendered a decision in the case of *Bank of America National Trust and Savings Association v. Cuccia* (90 Fed. (2d) 100), in which it narrated the history of the reinstatement proceedings. It therefore could have taken judicial notice of its own records and, to that extent, supplied any deficiencies in the record before it in the instant case.

The reason why the Circuit Court of Appeals should have considered the reinstatement proceedings is because the pronouncements of this Honorable Court in the *Wright* case, supra, are directly applicable to the Cuccia proceedings, viewed as a whole. Hence Petitioner's insistence that the Circuit Court of Appeals should have considered the effect of reinstatement, and his equal insistence that this Honorable Court should do so.

It may also be urged that a distinction must be made between expenditures made by Petitioner before and after Cuccia was adjudicated a bankrupt pursuant to the terms of the original subsection (s). This, however, is another narrow, legalistic distinction, which should not obscure the broad view of the proceedings contemplated as a continuous whole from inception.

SECOND SPECIFICATION OF ERROR.

THE COURT BELOW ERRED IN HOLDING PETITIONER PERSONALLY LIABLE FOR DISBURSEMENTS MADE BY HIM PURSUANT TO AUTHORITY OF A CONSTITUTIONAL STATUTE, AND IN HIS CAPACITY AS CONCILIATION COMMISSIONER FOR THE COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA, AND OFFICER OF THE COURT.

This Court has said in the *Wright* case, supra, that the status of a farm debtor under Section 75 is substantially that of receivership, except that the farm debtor is himself his own receiver. In some respects, a conciliation commissioner partakes of the function of a receiver. The farm debtor and all of his property, wherever situated, is subject to the exclusive jurisdiction of the Court (Sec. 75, subsection (n)), and the conciliation commissioner is the instrumentality through which the Court exercises its supervision over the farm debtor and his property.

It is well settled that in the absence of any personal or individual misconduct on the part of a receiver, his liability is official rather than personal. (*McNulta v. Lochridge,* 141 U. S. 327, 35 L. Ed. 796; *Texas & Pacific R. Co. v. Cox,* 145 U. S. 593, 36 L. Ed. 829; *Archambeau v. Platt,* 173 Mass. 249, 53 N. E. 816; *McNulta v. Ensch,* 134 Ill. 46, 24 N. E. 631; *Robinson v. Kirkwood,* 91 Ill. App. 54; *Rosso v. Freeman,* 30 Fed. (2d) 826.)

A receiver obeying the orders of the Court is not a guarantor of the correctness of the Court's rulings. Furthermore, when a receiver has paid out money or the fund in his hands in good faith and in obedience to the orders of the Court appointing him, he cannot

be compelled to make restitution and he is not personally responsible. If the Court has jurisdiction of the parties and the subject-matter, yet commits a legal error in the disposition of the fund, the receiver, because he is obliged to obey such an incorrect order, is protected. (*Clark on Receivers,* Second Edition, Vol. 1, Sec. 388, page 504.)

It is true that in this case no order was made authorizing Petitioner to make the disbursements to Cuccia. But the decision of the Circuit Court of Appeals was not based upon the lack of an order. That Court said:

> "This order must be reversed. The entire proceeds of the mortgaged crop belonged to appellant. Appellant was under no obligation to cultivate or harvest the crop or to pay Cuccia for doing so. Cuccia was expressly obligated to do these things himself, at his own expense. No conciliation commissioner, trustee, referee, judge or court could impose this obligation on appellant. Appellee (i. e., Adair), therefore, could not be and was not authorized or empowered to pay Cuccia, with appellant's money, for performing this obligation." (R. 95.)

Petitioner acted in the *utmost good faith,* and he should be protected under the principle that while acting in his official capacity as an officer of the Court, he cannot be held personally liable for acts performed in good faith where the Court had jurisdiction of the parties and of the subject-matter.

THIRD SPECIFICATION OF ERROR.

THE COURT BELOW ERRED IN HOLDING THAT THE COST OF CULTIVATING AND HARVESTING THE MORTGAGED CROP WAS NOT A PROPER CHARGE AGAINST THE GROSS PROCEEDS DERIVED FROM THE SALE OF THE CROP.

The discussion of this specification of error will be combined with the argument to be made under the fifth specification of error.

FOURTH SPECIFICATION OF ERROR.

THE COURT BELOW ERRED IN HOLDING, CONTRARY TO THE UNIVERSAL VIEW, THAT THE COST OF CREATING A FUND SHOULD NOT BE CHARGED AGAINST THE FUND.

Cultivating and harvesting of a crop is analogous to the creation of a fund. The work of cultivating and harvesting produces the crop which, upon sale, is turned into a fund consisting of the gross proceeds of sale. Obviously, there can be no crop unless there is cultivation and harvesting. Hence the cost of cultivating and harvesting, represented by the disbursements which Petitioner made to Cuccia, should have been deducted from the gross proceeds of sale and Petitioner's account should have been settled upon that basis.

It was said in *In re Torchia,* 185 Fed. 576, at 582, that it is the undoubted rule that the expenses of creating a fund should be paid out of it, including reasonable compensation to the parties who have been instrumental in creating the fund. In this case, certain creditors were saved expense because of certain

action taken by the referee and trustee, and it was held that these creditors ought to, in equity and good conscience, be willing that the referee and trustee's commissions and expenses should be allowed and paid out of the fund.

This principle is peculiarly applicable to the instant case. The property involved in this case consisted of a tract of land in San Bernardino County and a crop of grapes growing thereon. (R. 90.) These grapes were perishable and so was the vineyard itself. The production of a crop of grapes involves a long process of husbandry, and if any essential steps are omitted, there will be no crop. If Petitioner and Cuccia had refused to take any steps at all, what would have been the situation? Either the crop would have been lost, or, under the terms of the crop mortgage, the bank would have been obliged to expend all the money necessary to produce the crop.

What is the difference between expenditure by the bank and expenditure by Petitioner to produce the same result, namely, the production of the crop? To be sure, the bank, if it had spent the money necessary to produce the crop, as it might have done under the crop mortgage in the event of Cuccia's failure to do so, could have added that expense to the debt, but how has the bank been hurt by the diversion of money to Cuccia for the production of the crop, when if Cuccia had refused to take action, the bank would have had to expend the same amount of money to produce an identical crop? As the situation now stands, the bank

is awarded the entire gross proceeds of sale without any deduction whatever for the cost of producing the crop.

It is common practice to deduct from gross sales commissions and expense, if there is any, necessarily involved in making the sale. Why, under the same principle, cannot the cost of producing the crop likewise be deducted from the gross proceeds? The ruling of the Court below is tantamount to an unjust enrichment of the bank to the extent of cost of production and at the expense of an innocent third party, your Petitioner.

Suits by stockholders in which they assert a cause of action which actually belongs to the corporation, but which its directors refuse to assert, furnish another example of the principle that those who take the initiative in creating a fund are entitled to be reimbursed for the expense incurred in so doing. In all such cases, the expense is regularly charged against the fund. (*Nolte et al. v. Hudson Nav. Co.*, 47 Fed. (2d) 166; *Hutchinson Box Board & Paper Co. v. Van Horn*, 299 Fed. 424; *McCourt v. Singers-Bigger*, 145 Fed. 103; *Meeker v. Winthrop Iron Co.*, 17 Fed. 48.)

It is submitted, both upon principle and authority, that the order of the District Court settling and allowing Petitioner's accounts was right, and that the Circuit Court of Appeals was wrong in charging Petitioner personally with the amount of the disbursements made by him to Cuccia for cultivating and harvesting the crop.

FIFTH SPECIFICATION OF ERROR.

THE COURT BELOW ERRED IN HOLDING THAT IN A CASE WHERE A FARM DEBTOR HAS FILED A PETITION UNDER SECTION 75 OF THE BANKRUPTCY ACT, SUBSECTIONS (a) TO (r) INCLUSIVE, FOR COMPOSITION OR EXTENSION OF TIME WITHIN WHICH TO PAY HIS DEBTS; HAS BEEN ADJUDICATED A BANKRUPT UNDER THE PROVISIONS OF SUBSECTION (s) AS ENACTED BY CONGRESS ON AUGUST 28, 1935, A CONCILIATION COMMISSIONER, TO WHOM THE MATTER HAS BEEN REFERRED, EITHER BEFORE OR AFTER THE ADJUDICATION OF BANKRUPTCY, MAY NOT EXPEND ANY PART OF THE PROCEEDS DERIVED FROM THE SALE OF A MORTGAGED CROP TO DEFRAY THE EXPENSE NECESSARY FOR THE PRODUCTION OF THAT CROP, AND THAT IF HE DOES SO, HE IS PERSONALLY LIABLE TO THE CROP MORTGAGEE FOR THE EXPENDITURE.

In order to find the solution of the problem presented by this specification of error, it is necessary to consider Section 75 of the Bankruptcy Act in its entirety and as an expression by Congress of a public policy with respect to farm debt.

The Circuit Court of Appeals has in its decision completely ignored the purpose to be accomplished by the Act, and it has failed to appreciate that it was dealing with what is essentially a receivership situation. It is submitted that the conclusions reached by the Court below are entirely at variance with the necessary implications of the *Wright* case, supra.

In the Court below, the respondent bank relied almost exclusively on cases defining the rights of secured creditors under the Bankruptcy Act as it stood prior to the amendments of 1933, embraced in Sections 74, 75, etc. It was stated in respondent bank's opening

brief in the Court below that under ordinary bankruptcy proceedings there would be no doubt whatever of the bank's right to receive the proceeds of the sale of the crops constituting a part of the security for the indebtedness due it. It was also said that under well established bankruptcy practice, summary process will lie to compel the trustee in bankruptcy to deliver property in his possession to the person entitled thereto. It was urged that there is nothing contained in Section 75 of the Bankruptcy Act which authorized any variance from these well established principles of bankruptcy procedure.

Petitioner has no quarrel with this statement of the law as it existed prior to the adoption of Section 75. Until that section was enacted, the Bankruptcy Court had little or no jurisdiction over a secured creditor and certainly could not prevent him from realizing upon his security if that security had been honestly obtained in such manner as to involve neither a preference nor a fraudulent transfer.

We cannot agree, however, that the situation remains unchanged by Section 75. The truth of the matter is that Section 75, and particularly subsection (s) declared constitutional in the *Wright* case, supra, has radically changed all classical conceptions of bankruptcy practice. This can clearly be seen from a comparison of those established principles with the situation created under Section 75.

In the first place, subsections (a) to (r) of Section 75 contemplate a procedure which involves no adjudication in bankruptcy. Subsection (l) of Section

75 provides, first, for absolute dismissal upon distribution of the consideration for composition, and, second, discretionary retention of jurisdiction in the event that an extension of time of the payment of debts is obtained. Subsection (n) provides that the jurisdiction and powers of the Court, etc., shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition was filed with the Court.

In the second place, there is no specific provision in the whole section for the appointment of a trustee.

In the third place, winding up of the estate and distribution of the net proceeds in the shape of dividends to creditors is not the purpose of proceedings under Section 75.

Adjudication in bankruptcy, appointment of a trustee, winding up of the estate and distribution of proceeds ratably among creditors, are of the essence of the former bankruptcy practice. Section 75, however, in all of its aspects, contemplates retention of possession and title subject to encumbrances by the farmer himself under the supervision and jurisdiction of the Court. This is a radically new conception of bankruptcy law and it is futile to look to authority governing the prior bankruptcy practice as a criterion for the determination of problems arising under this new procedure.

Most important of all are the radically new provisions providing for retention by the farmer of his property after amendment of his petition and ad-

judication as a bankrupt, pursuant to subsection (s), for a period of three years, provided a reasonable rental is paid during the period. Equally radical is the stay of all adversary action by creditors for the collection of obligations secured or unsecured, or designed to impair the farmer's right to possession during the period of the three years' stay.

Furthermore, there is no express provision in Section 75 for the appointment of either a receiver or a trustee. On the contrary, the Act specifically provides that if at the time the farm debtor amends his petition and asks to be adjudged a bankrupt and a receiver is in charge of any of his property, such receiver shall be divested of possession of his property and the property returned to the possession of such farm debtor. (Section 75, subsection (s), Par. 4.)

In effect, the farm debtor is his own receiver, limited in his operations by the orders and directions of the Court. (Section 75, subsection (s), Par. 2.)

The problems presented by this entirely new procedure are not to be solved by reference to authority derived from the old bankruptcy practice. The Court has to blaze a new path, bearing in mind that the purpose of the Act is not to divest the farm debtor of his property, but, on the contrary, to enable him to retain it for the purpose of accomplishing his financial rehabilitation. (Section 75, subsection (s), Par. 2.)

In the *Wright* case, supra, this Court, by unanimous decision, held on March 29, 1937, that the new subsection (s) of Section 75 is constitutional to its full extent. Starting, therefore, with the premise that sub-

section (s) is valid, the Courts must now render their aid to its effective administration in accordance with the public policy expressed therein and the purposes to be accomplished thereby.

The paramount purpose of Section 75, and particularly subsection (s) thereof, is to prevent immediate foreclosure in a time of severe depression which, without the fault of the debtor, has resulted in the destruction of farm values and the values of agricultural products. The method of prevention is to suspend during a reasonable period the enforcement of the strict letter of the debtor's obligations and during the period of suspension to leave the debtor in possession and management of his property under the jurisdiction and supervision of the Court.

The situation is analogous to the old equity practice of administering railroads and corporations through the instrumentality of receivership, a practice which has been largely superseded by the relief afforded under Section 77 (b) of the National Bankruptcy Act. Under receivership, or under Section 77 (b), the purpose is to preserve the corpus of the estate, to suspend adversary action by creditors, and to effect a rehabilitation. In every case of such administration under the jurisdiction of a Court, whether by the method of equitable receivership or under Section 77 (b), much of the gross revenue derived from operation must, in the very nature of the case, be diverted from even secured creditors. If it is not permissible to divert revenue from operation to the payment of operating expenses, it is obvious

that the whole plan of receivership, or operation under Section 77 (b), becomes impossible of accomplishment.

The condition of the farm debtor is in no respect different from that of any other embarrassed debtor operating under judicial supervision. The farm ceases to be a going concern unless a portion, at least, of its revenues can be devoted to preservation and production.

Operation of the farm under supervision of the Court is a virtual receivership, and if the lien of the crop mortgage covers every dollar of gross proceeds derived from operation of the ranch and must be paid to the crop mortgagee, subsection (s) of Section 75 becomes a dead letter in every case where there is a continuing crop mortgage given as additional security for a promissory note already secured by a deed of trust to the land.

In the *Wright* case, supra, this Court recognized that the situation of the farmer operating under subsection (s) of Section 75 is closely analogous to that of receivership. We quote from the opinion of the Court as follows:

> "(a) The argument is that possession by the mortgagor during the stay is necessarily less favorable to the mortgagee than possession by a receiver or trustee would be. This is not true. The mortgagor is in default, but it is not therefore to be assumed that he is a wrongdoer, or incompetent to conduct farming operations. The legislation is designed to aid victims of the general economic depression. The mortgagor is familiar with the property, and presumably vitally

interested in preserving ownership thereof and ready to exert himself to the uttermost to that end. It is not unreasonable to assume that, under these circumstances, the interests of all concerned will be better served by leaving him in possession than by installing a disinterested receiver or trustee. For the mortgagor holds possession charged with obligations imposed for the benefit of the mortgagee as fully as if the property were in the possession of a receiver or trustee and there is probably a saving of expense. In order to protect the creditor's interest, the possession is at all times subject to the supervision and control of the Court; and if the debtor 'at any time' fails to comply with orders of the Court issued in the exercise of its supervisory power to protect the mortgagee against waste or other abuse of his possession by the mortgagor, the Court may order the property sold. *The farmer's proceeding in bankruptcy for rehabilitation resembles that of a corporation for reorganization.* As to the latter, it is expressly provided that the debtor may, to some extent, be left in possession, U. S. Code Title 11, Sec. 207 (c); and it is common practice to appoint as receivers one of the officials of the corporation." (Italics ours.) (Advance Sheets, Vol. 81, p. 495, L. E.)

Paragraph 2 of subsection (s) provides for a retention of the farm property by the debtor during the period of the stay, provided that he pays a reasonable rental, which is to be fixed by the Court. Rental implies that the creditors, secured and unsecured, shall get part, but not all, of the products of the farm in a case where the farm produces no other revenue except that derived from the production and sale of its

crops, as is the case here. The paragraph further provides for the application of the rental, which is to be used first for the payment of taxes and upkeep of the property, and the remainder to be distributed among secured and unsecured creditors and applied on their claims as their interests may appear.

In the *Wright* case, supra, this Court has specifically authorized the application of rental provided for in paragraph 2 of subsection (s). This Court has further held that it may enjoin an action by a mortgagee which would tend to defeat the purpose of subsection (s) to effect rehabilitation of the farm debtor. And lastly, it has unequivocally held that the provisions of subsection (s) make no unreasonable modification of the mortgagee's rights.

It is only fair to observe that this Court, in the *Wright* case, supra, was not dealing with the position of a crop mortgagee, nor with the particular problem under discussion. Nevertheless, the Court clearly recognized that any system of rental and application thereof, such as is provided for in paragraph 2 of subsection (s), "takes the income from the mortgagee". It approves this practice and says that it is the standard practice in receiverships.

The decision of the Circuit Court of Appeals precludes, in the case of a continuing crop mortgage, any application of the beneficent and remedial provisions of Section 75, and particularly of subsection (s) thereof. If the crop mortgagee is entitled to the gross proceeds without deduction of the expense necessarily involved in the production of the crop which yields these proceeds, it is obvious that not only can no

rental be fixed, but that the farm cannot be operated where its entire revenue is derived from the sale of the crops produced. Such a result is abhorrent to all of the principles involved in receivership practice. To deny to the farmer, as his own receiver, the benefit of the application of principles governing receiverships in general is to discriminate against the farmer as compared with all other receivers.

It can scarcely be denied, in view of the *Wright* case, supra, that notwithstanding the terms of any mortgage, the Court is vested with the exclusive jurisdiction of the farmer and all of his property, and that the farmer, under the supervision of the Court, is himself a virtual receiver. There is, likewise, no escape from the conclusion that an essential feature of successful administration under a receiver is the power to utilize such portion of the gross revenue as is necessary successfully to maintain, preserve, and operate the property. These conclusions are entirely incompatible with any rule which gives to a crop mortgagee, no matter how artfully the terms of the mortgage may be drafted, the right to the entire proceeds resulting from the sale of a crop. What receiver can operate property when the entire gross operating revenue must be paid to a secured creditor? The question answers itself and emphasizes the error into which the Court below has fallen.

The principle announced by the Circuit Court of Appeals in its decision in this case will practically destroy any possibility of farm debt adjustment, at least in the State of California. Practically without exception, every conciliation commissioner in the State

of California, when confronted with a crop mortgage, has, perforce, been obliged to appropriate a portion, at least, of the proceeds derived from the sale of the crop to defray the expenses of its production. Section 75 of the Bankruptcy Act, and particularly subsection (s), is entirely unworkable in the absence of such a procedure in cases where there is a continuing crop mortgage. Continuing crop mortgages are exceedingly prevalent in California. The result of the decision of the Circuit Court of Appeals, unless it be modified or reversed, will be: first, that no farm debtor will have any incentive to remain on his property, and he will be deprived utterly of any hope of financial rehabilitation; second, if he does not remain upon his property, he is very likely to become a charge upon the relief rolls of either the State or the Federal Government; and, third, no person in his right mind will assume the position of conciliation commissioner in view of the personal liability attaching to his office under the instant decision.

It is therefore respectfully submitted that the writ should issue in accordance with the prayer of the Petitioner.

Dated, San Francisco, California,
August 20, 1937.

Respectfully submitted,
WILLIAM LEMKE,
HAROLD M. SAWYER,
Attorneys for Petitioner.

Receipt of a copy of the within Petition and Brief is hereby admitted at San Francisco, California, this 23rd day of August, 1937.

Edmund Nelson
Hugo Steinmeyer
~~Leslie Jarman~~

Attorney for Respondent.

(Appendix Follows.)

Appendix

Judicial Code, Section 347, as amended (Mar. 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938).

Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.

(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal

shall be restricted to an examination and decision of the Federal questions presented in the case.

(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.

Section 75 of the National Bankruptcy Act. (July 1, 1898, c. 541, Sec. 75, as added Mar. 3, 1933, c. 204, Sec. 1, 47 Stat. 1470; June 7, 1934, c. 424, Secs. 8, 9, 48 Stat. 925; June 28, 1934, c. 869, 48 Stat. 1289; May 15, 1935, c. 114, Sec. 3, 49 Stat. 246; Aug. 28, 1935, c. 792, Secs. 1-6, 49 Stat. 942-945). U. S. C. A., Title 11, Sec. 203.

Agricultural compositions and extensions.

(a) *Conciliation commissioners; appointment; qualifications; term of office.*

Within thirty days after June 7, 1934, every court of bankruptcy of which the jurisdiction or territory includes a county or counties having an agricultural population (according to the last available United States census) of five hundred or more farmers shall appoint one or more referees to be known as "conciliation commissioners", one such conciliation commissioner to be appointed for each county having an agricultural population of five hundred or more farmers according to said census: *Provided further,* That where any county in any such district contains a smaller number of farmers according to said census, for the purposes of this paragraph such county shall be included with one or more adjacent counties where

the population of the counties so combined includes five hundred or more farmers, according to said census. In case more than one conciliation commissioner is appointed for a county, each commissioner shall act separately and shall have such territorial jurisdiction within the county as the court shall specify. A conciliation commissioner shall have a term of office of one year and may be removed by the court if his services are no longer needed or for other cause. No individual shall be eligible to appointment as a conciliation commissioner unless he is eligible for appointment as a referee and in addition is a resident of the county, familiar with agricultural conditions therein and not engaged in the farm-mortgage business, the business of financing farmers or transactions in agricultural commodities or the business of marketing or dealing in agricultural commodities or of furnishing agricultural supplies. In each judicial district the court may, if it finds it necessary or desirable, appoint a suitable person as a supervising conciliation commissioner. The supervising conciliation commissioner shall have such supervisory functions under this section as the court may by order specify.

(b) *Fee on filing petition; compensation and fees of conciliation commissioners; general orders to govern office of commissioner.*

Upon filing of any petition by a farmer under this section there shall be paid a fee of $10, to be transmitted to the clerk of the court and covered into the Treasury. The conciliation commissioner shall receive as compensation for his services, including all ex-

penses, a fee of $25 for each case docketed and submitted to him, to be paid out of the Treasury. A supervising conciliation commissioner shall receive, as compensation for his services, a per diem allowance to be fixed by the court, in an amount not in excess of $5 per day, together with subsistence and travel expenses in accordance with the law applicable to officers of the Department of Justice. Such compensation and expenses shall be paid out of the Treasury. If the creditors at any time desire supervision over the farming operations of a farmer, the cost of such supervision shall be borne by such creditors or by the farmer, as may be agreed upon by them, but in no instance shall the farmer be required to pay more than one-half of the cost of such supervision. Nothing contained in this section shall prevent a conciliation commissioner who supervises such farming operations from receiving such compensation therefor as may be so agreed upon. No fees, costs, or other charges shall be charged or taxed to any farmer or his creditors by any conciliation commissioner or with respect to any proceeding under this section, except as hereinbefore in this section provided. The conciliation commissioner may accept and avail himself of office space, equipment and assistance furnished him by other Federal officials or by any State, county or other public officials. The Supreme Court is authorized to make such general orders as it may find necessary properly to govern the administration of the office of conciliation commissioner and proceedings under this section; but any district court of the United States may, for

good cause shown and in the interests of justice, permit any such general order to be waived.

This section has been amended as follows:

Subsection (b) (second sentence).

"The conciliation commissioner shall receive as compensation for his services a fee of $25 for each case submitted to him, and when docketed, to be paid out of the Treasury.

(c) *Limitation on time for filing petition; schedules; stay of adjudication order.*

At any time within five years after March 3, 1933, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts. The petition or answer of the farmer shall be accompanied by his schedules. The petition and answer shall be filed with the court, but shall, on request of the farmer or creditor, be received by the conciliation commissioner for the county in which the farmer resides and promptly transmitted by him to the clerk of the court for filing. If any such petition is filed, an order of adjudication shall not be entered except as provided hereinafter in this section.

(d) *Filing inventory of estate.*

After the filing of such petition or answer by the farmer, the farmer shall, within such time and in such form as the rules provide, file an inventory of his estate.

(e) *Meeting of creditors; notice; examination of former; time for application for confirmation; control of property.*

The conciliation commissioner shall promptly call the first meeting of creditors, stating in the notice that the farmer proposes to offer terms of composition or extension, and inclosing with the notice a summary of the inventory, a brief statement of the farmer's indebtedness as shown by the schedules, and a list of the names and addresses of the secured creditors and unsecured creditors, with the amounts owing to each as shown by the schedules. At the first meeting of the creditors the farmer may be examined, and the creditors may appoint a committee to submit to the conciliation commissioner a supplementary inventory of the farmer's estate. The conciliation commissioner shall, after hearing the parties in interest, fix a reasonable time within which application for confirmation shall be made, and may later extend such time for cause shown. After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors.

(f) *Final inventory.*

There shall be prepared by, or under the supervision of, the conciliation commissioner a final inventory of the farmer's estate, and in the preparation of such inventory the commissioner shall give due consideration to the inventory filed by the farmer and to any

supplementary inventory filed by a committee of the creditors.

(g) *Acceptance by creditors as prerequisite to filing application for confirmation.*

An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after but not before (1) it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are affected, which number shall represent a majority in amount of such claims, and (2) the money or security necessary to pay all debts which have priority unless waived, and in case of a composition, the consideration to be paid by the farmer to his creditors has been deposited in such place as shall be designated by and subject to the order of the court.

This section was amended as follows:

"(g) An application for the confirmation of a composition or extension proposal may be filed in the court of bankruptcy after, but not before, it has been accepted in writing, by a majority in number of all creditors whose claims have been allowed, including secured creditors whose claims are affected, which number shall represent a majority in amount of such claims." (U.S.C.A. Title 11, Sec. 203 (as amended August 28, 1935).)

(h) *Date and place of hearing on application for confirmation.*

A date and place, with reference to the convenience of the parties in interest, shall be fixed for a hearing

upon each application for the confirmation of the composition or extension proposal and upon such objections as may be made to its confirmation.

(i) *Confirmation of proposal; conditions precedent.*

The court shall confirm the proposal if satisfied that (1) it includes an equitable and feasible method of liquidation for secured creditors and of financial rehabilitation for the farmer; (2) it is for the best interests of all creditors; and (3) the offer and its acceptance are in good faith, and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden. In applications for extensions the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted.

(j) *Terms of proposal; payments; supervision of property; exemptions to debtors.*

The terms of a composition or extension proposal may extend the time of payment of either secured or unsecured debts, or both, and may provide for priority of payments to be made during the period of extension as between secured and unsecured creditors. It may also include specific undertakings by the farmer during the period of the extension, including provisions for payments on account, and may provide for supervisory or other control by the conciliation commissioner over the farmer's affairs during such period, and for the termination of such period of supervision or control under conditions specified: *Provided,* That the provisions of

this section shall not affect the allowances and exemptions to debtors as are provided for bankrupts under section 24 of this title, and such allowances and exemptions shall be set aside for the use of the debtor in the manner provided for bankrupts.

(k) *Binding effect of confirmation; impairment of liens of secured creditors.*

Upon its confirmation a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided,* That such composition or extension shall not reduce the amount of nor impair the lien of any secured creditor, but shall affect only the time and method of its liquidation.

This section was amended as follows:

"(k) *Binding effect of confirmation; impairment of liens of secured creditors; reduction in interest rate.*

Upon its confirmation, a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided, however,* That such extension and/or composition shall not reduce the amount of or impair the lien of any secured creditor below the fair and reasonable market value of the property securing any such lien at the time that the extension and/or composition is accepted, but nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured." (U.S.C.A. Title 11, Sec. 203 (as amended August 28, 1935).)

(l) *Distribution of consideration on confirmation; priority of debts; modification of setting aside terms of proposal.*

Upon the confirmation of a composition the consideration shall be distributed under the supervision of the conciliation commissioner as the court shall direct, and the case dismissed: *Provided,* That the debts having priority of payment under section 104 of this title, for bankrupt estates, shall have priority of payment in the same order as set forth in said section 104 under the provisions of this section in any distribution, assignment, composition or settlement herein provided for. Upon the confirmation of an extension proposal the court may dismiss the proceeding or retain jurisdiction of the farmer and his property during the period of the extension in order to protect and preserve the estate and enforce through the conciliation commissioner the terms of the extension proposal. The court may, after hearing and for good cause shown, at any time during the period covered by an extension proposal that has been confirmed by the court, set the same aside, reinstate the case, and modify the terms of the extension proposal.

(m) *Setting aside confirmation for fraud.*

The judge may, upon the application of any party in interest, file at any time within six months after the composition or extension proposal has been confirmed, set the same aside and reinstate the case, if it shall be made to appear upon a trial that fraud was practiced in the procuring of such composition or extension, and

that knowledge thereof has come to the petitioners since the confirmation thereof.

(n) *Jurisdiction of court over debtor and property on filing of petition or answer.*

The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed.

This section was amended as follows:

"(n) *Jurisdiction of court over debtor and property on filing of petition or answer; extension of periods of redemption.*

The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under section 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among

others, contracts for purchase, contracts for deed, or conditional sales contracts, the right of redemption where the period of redemption has not, or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.

In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the con-

ciliation commissioner for the purpose of forwarding same to the clerk of court." (U.S.C.A. Title 11, Sec. 203 (as amended August 28, 1935).)

(o) *Exemption of farmer and property from proceedings for enforcement of claims.*

Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

(1) Proceedings for any demand, debt, or account, including any money demand;

(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

(3) Proceedings to acquire title to land by virtue of any tax sale;

(4) Proceedings by way of execution, attachment, or garnishment;

(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel

mortgage, conditional sale agreement, crop payment agreement, or mortgage.

(p) *Application of exemptions from proceedings to enforce claims.*

The prohibitions of subdivision (o) shall not apply to proceedings for the collection of taxes, or interest or penalties with respect thereto, nor to proceedings affecting solely property other than that used in farming operations or comprising the home or household effects of the farmer or his family.

This section was amended as follows:

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act." (U.S.C.A. Title 11, Sec. 203 (as amended August 28, 1935).)

(q) *Conciliation commissioner to assist in filing petition and subsequent proceedings without services of attorney.*

A conciliation commissioner shall upon request assist any farmer in preparing and filing a petition under this section and in all matters subsequent thereto arising under this section and farmers shall not be required to be represented by an attorney in any proceeding under this section.

(r) *Farmer defined.*

For the purpose of this section and section 74, the term "farmer" means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such farming operations occur.

This section was amended as follows:

"(r) For the purposes of this section, section 4(b), and section 74, the term 'farmer' includes not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur." (U.S.C.A. Title 11, Sec. 203 (as amended May 15, 1935).)

(s) *Adjudication as bankrupt on failure of proposal; stay of other proceedings against debtor; purchase of property by debtor; application of section to former cases.*

Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose

claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this title: *Provided,* That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

(1). After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that

the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the

creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this title, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided,* That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a réappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided,* That upon request in writing by any secured creditor or creditors, the court shall order

the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this title. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title.

(4) The conciliation commissioner, appointed under subsection (a) of this section, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of this subsection, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed $35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under this subsection, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under this section shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate ex-

clusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this title. The provisions of this title shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

(5) This title shall be held to apply to all existing cases now pending in any Federal court, under this title, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under this title may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this title shall not be grounds for denying him the benefits of this section.

(6) This title is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate. (U.S.C.A. Title 11, Sec. 203 (as amended August 28, 1935).)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 365

NOAH ADAIR,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, A NATIONAL BANKING ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S SUPPLEMENTAL BRIEF.

WILLIAM LEMKE,
HAROLD M. SAWYER,
Counsel for Petitioner.

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PETITIONER'S SUPPLEMENTAL BRIEF.

Question Involved.

The sole question involved in this case is whether petitioner, Noah Adair, appointed Conciliation Commissioner by the United States District Court, could use part of the proceeds of a mortgaged crop of grapes for the purpose of conserving the bankrupt's estate for the benefit of respondent, Bank of America National Trust and Savings Association, the mortgagee—and for other creditors.

The proceeding here is under Section 75 of the Bankruptcy Act. The United States District Court sat as a Court of Equity and the general principles that, "He who seeks equity must do equity" or "He who comes into equity must come with clean hands", applies. The attempt to get

something for nothing at the expense of another, because of legal technicalities, never has and never will succeed in a Court of Equity.

"Equity regards substance and not form." "It regards that done which ought to have been done." In short a Court of Equity uses common horse sense and does justice between the parties on the broad principles of right and wrong. We concede that it does this within well-established rules of practice and procedure.

Argument.

The petitioner, Noah Adair, during the time here in question was the duly appointed and acting Conciliation Commissioner for San Bernardino County, California. A Conciliation Commissioner, under the provisions of Section 75 of the Bankruptcy Act, is a judicial officer of the Court. He and the farm owner perform the functions and duties of a trustee in bankruptcy. (Subsections (e), (n) and (o), Sec. 75.) (*Robert Page Wright* v. *Vinton Branch of the Mountain Trust Bank of Roanoke, Va., et al.*, 300 U. S. 440.)

On August 4, 1934, Andrea Cuccia, a farmer in San Bernardino County, filed his petition under Section 75 of the Bankruptcy Act. This petition was approved on August 6th by the United States District Court for the Southern District of California and referred to the petitioner, Noah Adair, as Conciliation Commissioner (R. 18).

We concede that the respondent bank had a real estate mortgage on the bankrupt's vineyard and also a crop mortgage on the growing grapes and on subsequent grape crops to be grown. The respondent claims that because of these mortgages it is not only entitled to the net proceeds—after the necessary expenses of harvesting the grapes and taking care of the vineyard have been deducted —but to the gross proceeds derived from the sale of the

grapes. This is an attempt to gain unjust enrichment at the expense of the Conciliation Commissioner.

Counsel for respondent attempts to sustain that position on highly legal technicalities. He utterly fails to understand the aims and purposes of Section 75 of the Bankruptcy Act. He assumes that a mortgage is a sacred obligation. He forgets that every mortgage or contract is subject to the Constitution and the laws enacted under its provisions.

Counsel forgets that in a bankruptcy proceeding the Court takes full and complete, and not only partial, jurisdiction over all of the property of the debtor. He forgets that then a mortgage contract is no more sacred than any other kind of contract or obligation. One and all are merged into the bankruptcy proceeding.

Nothing Divine About a Mortgage.

Under the present and previous Bankruptcy Acts the courts have always had jurisdiction over encumbered property. It is true that these Acts generally preserved for the mortgagee or lien holder the right to recover the net proceeds or value of the property upon which he held a lien, but the right of the Court to assume jurisdiction and control over the property itself has always existed and exists now by specific Acts of Congress. (Sections 74, 75, 77 and 77B.)

> "The fact that secured debts are affected by the act does not, of course, raise any grave constitutional question, and can be dismissed with brief comment. *'A secured debt or lien is, so far as the Constitution of the United States is concerned, a no more sacred kind of property than an unsecured debt, • • • and the Constitution expressly permits and grants to Congress the power to affect such property, whether it be an unsecured debt or whether it be a lien, by laws relating to the subject of bankruptcies.' In re Burgh,* 7 Fed. Supp. 184, 185; *Continental Ill. Nat. Bank and Trust*

Co. v. *Chicago, Rock Island and Pacific Ry.*, 294 U. S. 648; *Campbell* v. *Alleghany Corporation*, 75 F. (2d) 947."

Conciliation Commissioner's Powers and Duties.

As we have seen, the jurisdiction and powers and duties of the District Court and the Conciliation Commissioner, over agricultural compositions and extensions, are set forth in Section 75 and more particularly, as far as this case is concerned, in Subsections (e) and (n).

> "(e) * * * After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, *the court shall exercise such control over the property of the farmer as the court deems in the best interest of the farmer and his creditors.*"
>
> "(n) *The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court.* In proceedings under this section, except as otherwise provided herein, *the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed.*"

In the case at bar the petitioner, Noah Adair, as Conciliation Commissioner, was compelled to pay for the harvesting of the grapes. The farmer-debtor was financially unable to do so. Grapes are a perishable commodity. If they had not been promptly harvested they would have been lost to the estate. The vineyard had to be taken care of to assure future crops. The undisputed evidence shows that the petitioner paid no more than was absolutely necessary to conserve and protect the estate and the mortgaged prop-

erty for the respondent and other creditors (R. 13-16 and 25-27).

All the items paid by the petitioner, except $22.50 to a court reporter, $50.00 for attorney's fees and $20.00 for filing fees, were paid to laboring men for services and to the farmer-debtor for living and other necessary expenses in connection with and while harvesting the grapes and taking care of the vineyard (R. 8 and 22).

All these payments were approved and OKed by the referee in bankruptcy (R. 27). They were allowed and approved by the District Court after hearing, at which hearing the respondent was present (R. 29).

As we have stated, under Section 75 the Conciliation Commissioner, like a referee in bankruptcy, is an officer of the Court and in addition he and the farmer-debtor take the place of a trustee in bankruptcy, and expenses incurred in the actual care and preservation of the property must be provided for to the postponement, if necessary, of all other charges. (Sec. 302, Black on Bankruptcy (2d); *In Re Mitchell*, 129 C. C. A. 452.)

Before Section 75.

Even before Sections 64, 75, 77 and 77B were enacted the trustee in bankruptcy had power to conserve property belonging to the estate and to continue the business for a limited period and charge the necessary expenses of doing so to the estate regardless of secured or unsecured creditors. It is true that prior to these Sections, the courts first paid the expenses out of the unsecured assets, but when those were exhausted it did not hesitate to pay them out of the secured assets. All that Congress did in these Acts was to provide a uniform rule and fix the rights of the debtor and creditors more definitely, and in doing so it intended to give the debtor an opportunity to be rehabilitated.

> "67. Contracting indebtedness.—A receiver who is authorized to conduct a business, for the successful con-

duct of which it is necessary and customary to receive credit and borrow money; has the implied power to purchase on credit and even to borrow money; where the power is expressly conferred by the court the limitations imposed must be observed." G. Coll. 3 Ed., 51.

"1216. Sums paid for preservation of property.—*The trustee may be allowed for all sums necessarily paid for the preservation of the estate.* If such sums have been paid by other parties he may with the approval of the court, repay them, especially if they had an interest in the preservation of the property, *and if there were circumstances which necessitated prompt action on their part.* Thus, if creditors prior to the appointment of a trustee should pay for liens which were being enforced in order to save the property for the estate they would be subrogated to the rights of the lienors. Where expenses are incurred by a trustee in the preservation of property subject to mortgage, solely in the interest of creditors generally, they should be paid out of the state, and may not be charged against the mortgagees." G. Coll. 3 Ed., 930.

"*Moneys spent by the trustee, with full knowledge of lien creditors, to preserve the estate are chargeable against proceeds of sale and payable prior to liens on the estate.* Virginia Securities Corp. *v.* Patrick Orchards, Inc. (C. C. A., 4th Cir.), 20 F. (2d) 78." G. Coll. 3 Ed., 930.

"1304. In general.—Subdivision 1 of Subsection b provides as the first statutory priority that there shall be paid "*the actual and necessary cost of preserving the estate subsequent to filing the petition.*" The words of this subdivision give priority to the (1) actual and (2) necessary cost (3) of preserving the estate (4) subsequent to filing the petition." G. Coll. 3 Ed., 1020.

"* * * If the business is so carried on by the trustee, *he should be required to pay all bills promptly if legitimately contracted by him in the business including the wages of skilled employees whom it is necessary to retain* as being the only persons acquainted with the

business. * * *" 181 Blk. Bkr. 2d Hornbook, 423.

"Allowance for Expenditures.—Expenditures by a trustee in bankruptcy, to be allowed by the court, must have been actually made, *reasonably necessary, and beneficial to the estate. The trustee is allowed to incur all necessary expenses for the care and custody of the bankrupt's property while in his hands, including the care and pasturage of sheep or stock.* * * * He may and should pay all taxes assessed or becoming due on the bankrupt's property while it is in his hands, including customs duties on imported merchandise, in order to obtain its release from bond. The Estate must also bear the cost of actions or proceedings properly undertaken by the trustee for the purpose of recovering assets or contesting spurious claims, but he will not be allowed the costs of unfounded and unnecessary litigation. * * * An expenses incurred exclusively for the benefit of a particular creditor or creditors cannot be charged to the estate in general.

"Employment and Compensation of Counsel.—* * * But on the other hand, where the situation of the estate is such that he really requires legal assistance, the trustee may employ counsel, and their fees for services properly and actually rendered to the trustee, to a reasonable amount, may be allowed as part of the costs of administration. * * *" 184 Blk. Bkr. 2d Hornbook, 431.

Same Power as Receiver and Trustee.

As a matter of fact a Conciliation Commissioner in bankruptcy occupies the same position as a referee in bankruptcy. The property is under the control of the Court. The farmer is permitted to continue in business with a view of rehabilitation. The Conciliation Commissioner supervises that possession and together with the farmer they have the same powers and duties as a receiver in a receivership or a trustee in a trusteeship.

"In General.—The general rule is, that the expenses of properly administering a trust are a lien, on behalf

of the trustee, on the estate in his hands, *and he will not be compelled to part with his control of that estate until such expenses are paid; nor does the right of reimbursement depend on the knowledge or consent of the cestui que trust.* Trustees invested with general powers of control and management are not bound to strict limitations; they are justified in making ordinary repairs and improvements and insuring the property. The duty of a trustee, whether of real or personal estate, to defend the title, at law or in equity, in case a suit is brought against it, is unquestioned, and the expenses are properly chargeable against the estate." 26 R. C. L. 1320, par. 179.

"* * * But where trustees have in good faith expended moneys under an invalid trust which they believed to be valid they cannot be compelled to account therefor to those who have long stood by and allowed the expenditures without objection. * * *" 26 R. C. L. 1387, par. 252.

"Credits.—A trustee who is compelled to account to his *cestui que* trust is entitled to credit for the sums *expended by him in the acquisition of the trust property, and for its protection and preservation,* and he is also entitled to a credit for interest on advances made for the use of the *cestui que* trust, to an allowance for depreciated money paid for rent of the trust estate, and for expenses incurred in erecting necessary and proper buildings. * * * The duty of a trustee, whether of real or personal estate, *to defend the title, at law or in equity,* in case a suit is brought against it, is unquestioned, and the expenses thus incurred are properly chargeable in his accounts against the estate. * * *" 26 R. C. L. 1389, par. 254.

"* * * If the mortgaged property is used for business purposes, the court may authorize the receiver to carry on the business. Having such authority, all debts incurred by him in carrying on the business for which the property is used, such as operating a mill, take precedence of the mortgage debt. Where the receiver incurred expenses that would necessarily

have been made by the mortgagee had he remained in possession of the premises, in order to make the same yield rent, such receiver will be allowed to retain from the rents collected the amount of his disbursements. His possession is the possession of the court, and without its authority no one can directly or indirectly interfere with the property. Like a trustee, he is bound to exercise such care over the property as a prudent man would take of his own. A receiver who acts in good faith, but under a mistake as to the extent of his powers, is not, it would seem, liable for his acts." Jones on Mortgages, 8 Ed., 436, par. 1951.

Approval of Court.

It is contended that the Conciliation Commissioner should not have harvested the grapes without an order of the Court. It is also contended that he should not have paid for the harvest without an order. But even if this were true, when the United States District Court approved and allowed these expenditures, then the acts of the Conciliation Commissioner, its appointed officer, became the acts of the Court. By its approval the Court made the Conciliation Commissioner's acts its own. If the Court could give the order in the first place, it could give it by approval afterwards. *Pneumatic Scale Corporation, Limited,* v. *Mainwaring,* 286 Fed. 378; *Thompson-Starrett Co.* v. *La Belle Iron Works,* 17 F. (2d) 536.

Going Concern.

A farm is a going concern. Section 75 of the Bankruptcy Act continues it as a going concern. At the time that the debtor here filed, the original Subsection (s) was part of Section 75. It provided the method by which the farm could be continued as a going concern for a term of five years. When Subsection (s) was held unconstitutional the new Subsection (s) was added. This has been held con-

stitutional. It provides the method of procedure for continuing the farm as a going concern for three years with a view of rehabilitating the farmer.

The total value of the farmer-debtor's estate on the day of filing his petition under Section 75, consisted of $22,500 real estate and $1,370 of household goods and other exempt property. He had no cash on hand (R. 2). The respondent had a mortgage on the real estate and on the crop of grapes growing and on subsequent crops (R. 4 and 28). There were no other funds or other property with which to pay the expenditures made on behalf of the estate. All of the expenditures were incurred prior to the dismissal on October 14, 1935. The respondent received $1,600, the proceeds from the crop of 1935 (R. 78).

Conclusion.

From the above it is clear that the District Court had jurisdiction of the farmer-debtor and over his property from August 4, 1934, to October 14, 1935, when the debtor's petition was dismissed. But the Court again assumed jurisdiction on March 16, 1936, when it reinstated or permitted the debtor to refile his petition.

In closing may we respectfully refer this Court to our brief in support of the petition for writ of certiorari beginning with page eleven. The decision of the Circuit Court of Appeals should be reversed and the District Court's decision reinstated.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term 1937
No. 365

NOAH ADAIR,

Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Respondent.

RESPONDENT'S REPLY TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF CASE.

Petitioner's main argument is predicated upon the statement that the original proceedings of the debtor under Section 75 and Section 75 (s) of the Bankruptcy Act, although dismissed, were subsequently reinstated under subsection (s) of Section 75 as amended August 28, 1935, and that the reinstatement validated all proceedings theretofore taken, including disbursements made by petitioner.

This entire argument is based upon an erroneous assumption of the existence of certain facts stated in the petition and brief. Before attempting to answer the argument we desire to point out these erroneous assumptions.

(a) **Original Proceeding of Debtor Not Dismissed Because Original Subsection (s) of Section 75, Bankruptcy Act, Held Unconstitutional.**

On page 4 of the petition and page 17 of the brief it is stated that it is apparent that the original proceedings of the debtor Cuccia were dismissed because of the declaration by the Supreme Court that subsection (s) of Section 75 was unconstitutional. There is nothing in the record to justify this assumption. The statute involved was amended on August 28, 1935, almost two months *before* the dismissal and at the time of dismissal that ground was not available.

The Circuit Court of Appeals in its opinion [R. 93] referred to its own decision in the case of *Bank of America National Trust & Savings Association v. Cuccia,* 90 Fed. (2d) 100, decided May 4, 1937, stating that it was not concerned with the reinstatement of Cuccia's proceedings. A reference to the opinion, however, which is cited in petitioner's brief, indicates that the motion to dismiss which was granted October 14, 1935, was upon the ground that no composition agreement could be had between the debtor and his creditors. No question of constitutionality was involved.

(b) **Debtor's Proceedings Were Not Reinstated After Dismissal.**

On page 6 of the petition and page 17 of the brief it is stated that after dismissal the debtor's proceedings were reinstated. This does not appear from the record but petitioner attempts to justify his statement by a reference to the decision in *Bank of America National Trust & Savings Association v. Cuccia, supra,* and the contention that the Circuit Court of Appeals should have required a supplemental record to show the reinstatement.

A reference to the decision cited shows that the Circuit Court of Appeals stated in its opinion that the debtor petitioned the district court for leave to file a *new petition* under Section 75 and this leave was granted. The court states that the debtor filed such new petition "thereby reinstating the proceeding which had been dismissed." Whether or not this conclusion by the Circuit Court of Appeals is correct is not finally determined because a petition for rehearing was granted on July 1, 1937. (See Advance Sheet, Vol. 90, Fed. (2d) No. 2, p. VII, Rehearing Table.)

In any event, the record before this court does not show that there was any reinstatement of the original proceeding, nor does it show that petitioner made any attempt in the Circuit Court of Appeals to bring before that court the record upon which petitioner might rely to establish such a contention.

(c) **Moneys Paid by Petitioner to Cuccia Were Not Used in Cultivating and Harvesting the Mortgaged Crop.**

The third erroneous assumption of fact stated at page 3 of the petition and page 16 of the brief is that $1290.33 of the funds paid by petitioner to Cuccia was for labor performed and expenses incurred in cultivating and harvesting the mortgaged crop. The record cited by petitioner [R. 17, 18] does not substantiate the statement. The account filed by petitioner [R. 17, 18] does not indicate that *any* of the disbursements were for the cultivation and harvesting of the mortgaged crop, but on the contrary, indicates that the disbursements were all made during a period of about ten months *after* the crop was harvested and sold. The record does show, however, that at the time of the hearing in the district court petitioner testified that approximately $400.00 was used to pay for picking the grapes [R. 48]. The rest was used for care of the *land* and expenses of administration.

QUESTION INVOLVED.

It is respondent's contention that the only question involved in this case is whether or not a Conciliation Commissioner, after the filing of a petition under Section 75 of the Bankruptcy Act, may harvest the crops growing upon lands of the farmer debtor which are subject to a valid crop mortgage executed more than four months prior to bankruptcy and expend the proceeds without regard to the provisions of the crop mortgage, depriving the mortgagee of his security.

ARGUMENT.

Petitioner has argued five separate specifications of error and we will reply to the argument under each specification.

First Specification of Error.

Petitioner's argument is based entirely upon an erroneous assumption that an order of reinstatement of the debtor's original proceedings was made on March 16, 1936. As we have previously pointed out no such reinstatement was ever made, and in any event, if any other proceedings were material to the determination of this case by the Circuit Court of Appeals, petitioner should have brought before that court, by proceedings for diminution of the record, whatever was deemed necessary for that purpose.

Second Specification of Error.

The petitioner received the proceeds of crops subject to a valid crop mortgage and deposited them in a bank *in his own name* with that of the debtor [R. 17] and thereafter wrote checks upon the bank account [R. 39]. By taking possession of the funds he stepped beyond his jurisdiction as conciliation commissioner and referee and usurped the functions of a trustee in bankruptcy. Whether he be considered as a trustee in bankruptcy or a receiver, as contended by petitioner, no disbursement of the funds could be valid unless based upon a previous order of court. No order was ever obtained nor was any notice of any disbursement ever given to any creditor [R. 43].

Petitioner's assertion that he acted in utmost good faith may well be questioned. In November, 1934, he refused to give a report of the proceedings upon a request therefore [R. 44-46]. Although demand for an accounting of the proceeds of the crop was made by the crop mortgagee [R. 14] he refused to render any account until compelled by court order [R. 16]. The account itself [R. 17, 18] is, to say the least, vague and indefinite. No vouchers were filed or produced at the hearing, nor even the cancelled checks upon the account [R. 50].

Fourth Specification of Error.

Petitioner's argument again is predicated upon an erroneous statement of fact. As we have previously pointed out, the most that can be claimed is that $400.00 was used to pay the cost of harvesting the crop, the balance used for subsequent care of the land and expenses of administration.

Even as to the $400.00 the judgment of the Circuit Court of Appeals is the only judgment that properly could be rendered because as pointed out in the opinion [R. 91] and as provided in the mortgage [R. 57, 58], the mortgage obligated Cuccia to harvest the crop and prepare it for market and when so prepared, ***deliver it to the mortgagee.*** Cases cited by petitioner are not applicable nor even analagous to the facts of the case at bar.

Fifth Specification of Error.

Petitioner concedes that prior to the enactment of Section 75 of the Bankruptcy Act (11 U. S. C. A. 203), respondent would have been entitled to recover the full proceeds of the crop from petitioner, but he contends that the enactment of Section 75 and the subsequent enactment and amendment of subsection (s) of Section 75 has completely changed the law and that the former principles no longer control. Rather than point out the particular provision of the statute or decision which might justify the contention, the argument is, in effect, a plea to this court that unless it determines that a conciliation commissioner may appropriate the security of a creditor for the benefit of the debtor or other creditors, the statute will be unworkable.

It is respondent's contention that in so far as the facts of this case are concerned, the elementary rule that a creditor is entitled to his security is still the law, and that petitioner, even though considered as a *de facto* trustee in bankruptcy or a receiver, having unlawfully appropriated funds in his possession belonging to the creditor, is personally liable therefore.

Petitioner having conceded the law prior to the enactment of Section 75 (Petitioner's Br. p. 31), it may briefly be demonstrated that the new statute does not permit of the construction claimed. Subsection (k) of Section 75 of the Bankruptcy Act (11 U. S. C. A. 203) as it existed at the time of the acts complained of, provides as follows:

"(k) *Binding effect of confirmation; impairment of liens of secured creditors.* Upon its confirmation a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: *Provided,* That such composition or extension shall not reduce the amount of nor impair the lien of any secured creditor, but shall affect only the time and method of its liquidation."

There could be no question of the time or method of liquidation of the security. The security was *liquidated* by a sale of the crop by the petitioner. It is impossible to say that the use of the proceeds, other than the payment upon the debt secured, does not reduce or impair the lien. The use of the proceeds for anything except payment upon the debt constituted a confiscation of the security. The mortgage required delivery of the harvested crops to the mortgagee. After sale, the use of *any* of the proceeds for any purpose other than payment on the debt, constituted a *taking* of the security, whether the money was used to pay a debt incurred by the debtor in harvesting the crop or for future care of the land or for expenses of administration, or any of the other items shown in the account.

Not only does the statute itself prevent impairment of the plan, but this court has held that the Congress does not have the power under the Constitution to enact legislation which would permit any substantial impairment of a mortgagee's security.

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555; 79 L. Ed. 1593; 55 S. Ct. 854.

Wright v. Vinton Branch of the Mountain Trust Bank, 81 L. Ed. 487 (Advance Opinions).

Petitioner refers to the provisions of the statute requiring payment of rental, arguing that as the farm debtor must pay rental while he remains in possession, he must be allowed to use part of the income for that purpose. The fallacy of the argument lies in the fact that the security here consisted of perishable crops. The mortgagee of the crops would not be entitled to rental paid upon the land and of course when the crop was sold the security was liquidated. Furthermore, no order requiring the debtor to pay rental was ever made.

The petition and brief seek to present this matter as one which should be determined under the provisions of Subsection (s) of Section 75 of the Bankruptcy Act as amended August 28, 1935. The crop was sold and the money all disbursed *prior* to the enactment of the amended statute and its provisions are immaterial to the issues of the present case.

CONCLUSION.

It is respectfully submitted that the petition fails to show any error in the decision of the Circuit Court of Appeals and the petition should therefore be denied.

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Respondent.

RESPONDENT'S BRIEF ON CERTIORARI

The brief heretofore filed by respondent was filed in opposition to the petition for certiorari and directed mainly to points considered to indicate the insufficiency of the petition. As the court has now granted the petition, respondent feels it desirable to present more fully the merits of the appeal in the first instance. Reference will be made in the course of the argument to points urged by petitioner.

Statement of the Case.

The statement of the case in petitioner's brief is incomplete and in some respects inaccurate. A complete statement of the case is necessary to a proper determination of the issues.

Andrea Cuccia filed a petition under Section 75 of the Bankruptcy Act on August 4, 1934 [O. R. (Original Record) p. 4; P. R. (Printed Record) p. 68]. The proceedings were referred to Noah Adair, the petitioner herein, as Conciliation Commissioner for the County of San Bernardino, State of California, on August 6, 1934 [O. R. p. 35, P. R. p. 18]. The debtor was unable to make an agreement of composition or extension and on January 7, 1935, filed an amended petition under Subsection (s) of Section 75 of the Bankruptcy Act and was adjudicated a bankrupt, the proceedings being referred to D. W. Richards, Referee in Bankruptcy for San Bernardino County [O. R. p. 36, P. R. p. 69]. After proceedings before the Referee he signed an order of dismissal on April 16, 1935 [O. R. p. 37, P. R. p. 74]. A petition to review the Referee's order was filed [P. R. p. 72], but the proceedings were subsequently dismissed by the District Court on October 14, 1935 [O. R. p. 13, P. R. p. 76].

After the filing of the debtor's petition on August 4, 1934, the Conciliation Commissioner harvested the crop

of grapes growing upon the debtor's property and received the sum of $1,437.37 from the sale of those crops [O. R. pp. 17, 26; P. R. pp. 8, 13]. This fund, as shown by the Conciliation Commissioner's account [O. R. p. 13, P. R. p. 8], was used by the Conciliation Commissioner in the payment of claims for labor upon the real property of the debtor after the filing of the debtor's petition, payments to the debtor for living expenses, and various expenses of administration.

Prior to February 6, 1936, respondent had demanded an accounting from the petitioner for the proceeds of the 1935 crop [O. R. p. 14, P. R. p. 6]. This account was not made and on February 6, 1936, respondent filed a petition for an order directing an accounting [O. R. p. 10, P. R. p. 4] and on the same day the District Court made an order directing the Conciliation Commissioner to account [O. R. p. 16, P. R. p. 7]. Pursuant to this order the Conciliation Commissioner filed a document purporting to be an account [O. R. p. 17, P. R. p. 8], which was not verified nor accompanied by any vouchers. Respondent filed verified objections and exceptions to the account [O. R. p. 19, P. R. p. 9], which alleged in substance that respondent held a chattel mortgage upon the crops growing upon the real property of the debtor; that the Conciliation Commissioner had harvested the crops with full knowledge of the mortgage and that respondent at no time had any knowledge or notice of any order made for the disbursement of any of the proceeds of the sale of the crops.

The Conciliation Commissioner filed a verified answer to the objections of respondent to the account [O. R. p. 26, P. R. p. 13]. The answer did not deny the allegations that the petitioner had full knowledge of the chattel mortgage and that no notice of the disbursements of any of the funds was given creditors, but sought to justify the expenditures upon the ground that the items paid were necessary for "the protection of said premises" and also that certain disbursements were made on the order of D. W. Richards, Referee in Bankruptcy. No copy of any such order was referred to in the answer or introduced at the hearing upon the account.

A hearing was had before the District Court upon the account and the objections thereto and the court made a minute order overruling the objections and settling the account [O. R. p. 31, P. R. p. 16]. This is the order from which the appeal was taken and which was reversed by the Circuit Court of Appeals.

The proceedings in which the accounting was rendered by petitioner were dismissed October 14, 1935. Petitioner states it is *apparent* that they were dismissed because the statute under which they were pending was unconstitutional [Pet. pp. 4, 17]. This is not the fact. The petition upon which the order of dismissal was based [P. R. pp. 70, 72], shows that objections were made by respondent to the proceedings under Subsection (s) of Section 75 of the Bankruptcy Act upon the ground that the debtor had failed to file a good faith proposal for a composition or extension with his creditors prior to filing the amended

petition under subsection (s). The referee found this to be true and ordered the proceedings dismissed for that reason [P. R. p. 74]. This finding and order was incorporated in the petition to dismiss and made the basis for the motion before the judge [P. R. p. 75] upon which the order of dismissal was made [P. R. p. 76].

On March 16, 1936, Andrea Cuccia, the debtor filed a petition in the District Court asking leave to file a new petition under Section 75 of the Bankruptcy Act, [P. R. p. 77], and an order was made granting leave to file a new petition under that section and restraining respondent and the sheriff from dispossessing the debtor [P. R. p. 79] pending the hearing thereof. The petition for leave to refile shows on its face that *after* the dismissal of the original proceeding the land belonging to the debtor had been sold at foreclosure sale and the creditor (respondent) had secured a judgment for possession of the property and alleged, among other things, that the debtor had "discovered new facts and evidence" which led him to believe that he could now make a composition with his creditors.

This respondent appealed to the Circuit Court of Appeals for the Ninth Circuit from the restraining order of March 16, 1936, [P. R. p. 79], and the Circuit Court by an opinion rendered May 4, 1937, dismissed the appeal upon the ground that it had not been allowed under Section 24b of the Bankruptcy Act, the opinion being printed in the advance sheets of the Federal Reporter at 90 F. (2d) 100. This is the opinion relied upon by petitioner

to establish his contention that the *original* proceedings of Andrea Cuccia under Section 75 of the Bankruptcy Act, in which the accounting which is now before the court was rendered, were *reinstated* and the entire case validated *ab initio* (Pet. Br. pp. 17, 18, 20, 21, 24). The Circuit Court of Appeals, however, granted a rehearing in the case of *Bank of America National Trust and Savings Association v. Andrea Cuccia,* 90 F. (2d) 100, on July 1, 1937, (See Advance Sheet Vol. 90 F. (2d) No. 2, p. VII Rehearing table). A further decision was rendered December 30, 1937, eliminating the statement that the proceedings were reinstated.

The petition for leave to refile under Section 75 of the Bankruptcy Act [P. R. p. 77] and the order granting leave to refile [P. R. p. 79], were made part of the record by stipulation, [P. R. p. 67] and are the only documents or pleadings upon which petitioner may rely to support his contention that the original proceedings were reinstated.

It should also be noted that while leave to refile under Section 75 of the Bankruptcy Act was granted on March 16, 1936, the objections filed by respondent to the accounting made in the *original* proceedings were not filed until June 12, 1936, [O. R. p. 19; P. R. p. 9], and the answer of petitioner to the objections was filed July 13, 1936 [O. R. p. 26; P. R. p. 13], some four months later. The defense now claimed that the original proceedings were reinstated was not pleaded nor raised in the trial court. [See answer, O. R. p. 26; P. R. p. 13.]

Summary of the Argument.

Point One. The only question involved is the sufficiency of the accounting filed by petitioner. This court is not concerned with the alleged reinstatement nor with the provisions of the present statute.

Point Two. Respondent as the holder of a mortgage upon crops of the farmer debtor was entitled to all of the proceeds of the sale of those crops.

Point Three. Conciliation Commissioner was not a trustee in bankruptcy and was not authorized to take possession nor to expend any part of funds received from the sale of crops subject to mortgage. By usurping the functions of a trustee in bankruptcy and disbursing funds of the estate without a valid order he rendered himself personally liable.

Point Four. After adjudication under subsection (s) of section 75 of the Bankruptcy Act the Conciliation Commissioner no longer had jurisdiction of the proceedings for any purpose.

Point Five. Moneys for which petitioner was surcharged were not expended in labor performed and expenses incurred in cultivating and harvesting the mortgaged crop.

Point Six. The provisions of section 75 of the Bankruptcy Act do not permit of the appropriation of a portion of the security of any creditor for the benefit of the bankrupt or other creditors.

Point One.

The Only Question Involved is the Sufficiency of the Accounting Filed by Petitioner. This Court is not Concerned with the Alleged Reinstatement nor with the Provisions of the Present Statute.

The disbursements for which petitioner was charged by the decision of the Circuit Court of Appeals were made between September, 1934, and June 1, 1935, while he was acting as a Conciliation Commissioner under section 75 of the Bankruptcy Act (47 Stat. 1470, c. 204, sec. 1; 48 Stat. 925, c. 424, secs. 8, 9; 48 Stat. 1289, c. 869). From August 4, 1934, to January 7, 1935, the proceedings were pending under section 75, subsections (a) to (r) [O. R. p. 34; P. R. p. 18], and from January 7, 1935, until October 14, 1935, were pending under subsection (s) of section 75 as enacted June 28, 1934 (48 Stat. 1289, c. 869).

After receiving the funds claimed by respondent, on September 26, 1934, the petitioner disbursed the same from time to time until June 1, 1935. The correctness and validity of these disbursements, as shown by his accounting, is the sole matter in dispute. The money was received and disbursed by petitioner *prior to the enactment* of the amended subsection (s) of section 75 of the Bankruptcy Act on August 28, 1935 (49 Stat. 942-945, c. 792). The propriety of the disbursements must be determined by the law as it existed at the time they were made.

Petitioner recognizes this most elementary principle and seeks to avoid it by claiming that the original proceedings were reinstated (Pet. Br. p. 21). As we have heretofore pointed out (*ante*, pp. 6, 7, 8) there is no basis in the record for this contention.

Point Two.

Respondent as the Holder of a Mortgage upon Crops of the Farmer Debtor was Entitled to All of the Proceeds of the Sale of Those Crops.

Respondent's claim to the funds received and disbursed by the petitioner was by reason of a validly-executed crop mortgage, executed by the debtor more than a year prior to the bankruptcy petition [O. R. p. 50; P. R. p. 28]. It is respondent's contention that upon the sale of the crops the security was liquidated and the respondent, as mortgagee, became entitled to the proceeds of the sale.

Section 2955 of the Civil Code of California provides, in part:

> "Mortgages may be made upon all growing crops, including grapes and fruit . . ."

Under the terms of the crop mortgage executed by Andrea Cuccia, the bankrupt in these proceedings, respondent was given a lien upon all crops of grapes standing, planted or grown, or that might be grown, during the years 1933 and 1934, or any subsequent year prior to payment in full of the indebtedness secured by the mortgage [O. R. pp. 50, 51; P. R. pp. 28, 29].

Among other things the mortgagor, by the terms of the mortgage, promised and agreed "to attend to, care for, cultivate, irrigate and protect said crop or crops hereinabove mentioned and described, in a good, farmer-like manner and according to the most approved methods of farming, until the same shall be ready for harvesting, and then to harvest and prepare said crop or crops for market, and when said crop or crops are so prepared, *to deliver said crop or crops to the mortgagee,* who may sell and

dispose of the said crops at the then market price and apply the proceeds of said sale toward payment of the notes and obligations secured thereby, and that the lien of this mortgage shall attach to said crop or crops after the same have been severed and until the amounts secured hereby have been paid in full;" [O. R. pp. 57, 58; P. R. p. 33].

The bank did not consent to the removal of the crops by the Conciliation Commissioner and in fact had brought an action to foreclose the chattel mortgage and the entries in the Conciliation Commissioner's docket [Creditor's Exhibit No. 1, O. R. p. 34; P. R. p. 18] show that a complaint to foreclose the crop and chattel mortgage was filed and summons served. Except for the bankruptcy proceedings the debtor, the Conciliation Commissioner and the purchaser of the crops would be liable to respondent in damages for conversion of the crops upon which respondent held the mortgage.

Campodonico v. Santa Maria Bean and Grain Co., 86 Cal. App. 339, 260 Pac. 830;

Hammels v. Sentous, 151 Cal. 520, 91 Pac. 327.

Under ordinary bankruptcy proceedings there would be no doubt whatever of respondent's right to receive the proceeds of the sale of the crops constituting a part of the security for the indebtedness due to respondent. Section 57(h) of the Bankruptcy Act [App. p. iv] provides that the value of securities held by a secured creditor shall be determined by converting them into money and the amount of such value applied upon the debt and a dividend paid only upon the unpaid balance. Section 65(a) of the Bankruptcy Act (July 1, 1898, 30 Stat. 564, ch. 541, sec.

66 (U. S. Code, title 11, sec. 106)) provides that "Dividends of an equal percentum shall be declared upon all allowed claims, except such as have priority *or are secured.*" Under well-established bankruptcy practice summary process will lie to compel the trustee in bankruptcy to deliver property in his possession to the person entitled thereto. (*Remington on Bankruptcy*, section 2446.)

Petitioner concedes this to be the law prior to the enactment of section 75 of the Bankruptcy Act (Pet. Br. pp. 30, 31), but claims that the new statute alters the rights of the parties. It is respondent's contention that, under the facts of this case, the fundamental right of a secured creditor has not been changed by the new statute.

Section 75 of the Bankruptcy Act (July 1, 1898, c. 541, sec. 75, as added Mar. 3, 1933, c. 204, sec. 1, 47 Stat. 1470; June 7, 1934, c. 424, secs. 8, 9, 48 Stat. 925; June 28, 1934, c. 869, 48 Stat. 1289; May 15, 1935, c. 114, sec. 3, 49 Stat. 246; Aug. 28, 1935, c. 792, secs. 1-6, 49 Stat. 942-945 (U. S. C. A. 11, sec. 203)), subsections (a) to (r), inclusive, gives a farmer debtor an opportunity to reach a composition or extension with his creditors. The sole purpose of the statute is to afford an opportunity for the farmer debtor to reach an *agreement* with his creditors. If the required number and amount of creditors *agree* to a plan of composition or extension it may be confirmed by the judge. If sufficient creditors do not agree, then the proceedings may be dismissed or the debtor may file an amended petition under subsection (s) of section 75 of the Bankruptcy Act.

Subsection (o) of section 75 of the Bankruptcy Act provides that after the filing of the petition certain proceedings for the enforcement of any liens against property of the bankrupt shall be stayed pending the disposition of the petition. Subsection (n) of section 75, as it existed at the time of the filing of these proceedings, provides as follows:

> "The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers and duties of its officers, the duties of the farmer, and *the rights and liabilities of creditors,* and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, *shall be the same as if a voluntary petition for adjudication had been filed* and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

Subsection (e) of section 75 provided, in part, as follows:

> "After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors."

There is nothing in these sections indicating any change in the fundamental rule that a creditor is entitled to his security and to have the proceeds of the sale of the security applied on account of the indebtedness and, in fact, the

statute expressly provides in subsection (n) that the rights of the creditors shall be the same as in a voluntary bankruptcy. The statute goes further, however. It expressly provides that no composition or extension shall reduce the amount of or impair the lien of any secured creditor. Subsection (k) provides as follows:

> "Upon its confirmation a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby; provided, that such composition or extension *shall not reduce the amount of nor impair the lien* of any secured creditor, but shall affect only the time and method of its liquidation."

The simple facts are these: Respondent had a lien, by way of crop mortgage, upon specific personal property, a crop of grapes growing upon land of the debtor. The crop was sold and at that moment the security was *liquidated.* The use of the proceeds of the sale for any purpose other than payment of the debt secured constituted a *taking* of the security from the respondent directly contrary to the provisions of subsection (k) and the elementary rules of bankruptcy procedure.

Not only does the statute itself prevent impairment of a lien, but this court has held that the Congress does not have the power under the Constitution to enact legislation which would permit any substantial impairment of a mortgagee's security.

> *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 79 L. Ed. 1593, 55 S. Ct. 854;
>
> *Wright v. Vinton Branch of the Mountain Trust Bank,* 300 U. S. 440, 81 L. Ed. 736, 57 S. Ct. 556.

In the case last cited this court held that the statute might act upon the *remedy* of the mortgagee and to a reasonable extent impose limitations upon the right of the mortgagee to exercise the powers granted to him by the contract. There is nothing in this court's opinion, however, which would indicate that it is permissible to confiscate a portion or all of the *physical property* which constitutes the security so that it is completely and irrevocably lost to the creditor. The taking of a portion of the proceeds of the sale of a specific crop is no different than if the debtor were allowed to sell a part of his land free of the lien of a mortgage and apply the sales price to raising crops on other lands. The statute itself prohibits such a taking.

There are apparently no reported decisions bearing directly upon the point involved herein. Subsection (i) of section 74 of the Bankruptcy Act (Mar. 3, 1933, 47 Stat. 1467, ch. 204, sec. 1; June 7, 1934, 48 Stat. ch. 424, sec. 2; 11 U. S. C. A. 202) is identical to subsection (k) of section 75 and has been held to prevent any reduction or impairment of the lien of a secured creditor.

In re Sterba (C. C. A. 7), 74 Fed. (2d) 413;

In re Iversen (C. C. A. 7), 85 Fed. (2d) 159.

Respondent was the holder of a mortgage upon specific property. When that property was sold by the petitioner the security was liquidated and respondent, as holder of the mortgage, became entitled to the proceeds.

Point Three.

Conciliation Commissioner was not a Trustee in Bankruptcy and was not Authorized to Take Possession nor to Expend any Part of Funds Received from the Sale of Crops Subject to Mortgage. By Usurping the Functions of a Trustee in Bankruptcy and Disbursing Funds of the Estate Without a Valid Order He Rendered Himself Personally Liable.

Petitioner complains in his second specification of error that the court below erred in holding him personally liable for the funds disbursed upon the theory that he was an officer of the court and in some respects similar to a receiver, who would not be liable for disbursing funds pursuant to an order of court, even if the order was erroneous.

The record here shows that the petitioner, the Conciliation Commissioner for the County of San Bernardino, directed the harvesting of crops growing upon the land of the debtor which were subject to a crop mortgage to appellant [O. R. p. 17; P. R. p. 8]. In other words, the Conciliation Commissioner, while a referee in bankruptcy, took into his personal possession property belonging to the bankrupt but subject to a valid chattel mortgage to a creditor, sold the property and deposited the proceeds in a bank account subject to withdrawal by a check signed by himself and the debtor. In so doing the Conciliation Commissioner usurped the functions of a trustee in bankruptcy.

Section 33 of the Bankruptcy Act (July 1, 1898, 30 Stat. 555, ch. 541, sec. 33, 11 U. S. C. A. 61) creates two offices to provide for the administration of its provisions, namely, the office of referee and the office of trustee. The jurisdictions, duties, rights and liabilities of these two

officers are clearly defined by the provisions of the Bankruptcy Act itself.

The referee has *jurisdiction* to hear and determine the rights of the parties and to exercise the powers of a court of bankruptcy (Bankruptcy Act, secs. 38, 39; 30 Stat. 555; 11 U. S. C. A. 66, 67; Rule XII of the General Order in Bankrutcy, 288 U. S. 623). [See App. pp. i, ii, v.] On the other hand, it is the duty of the trustee to take *possession* of the assets of the bankrupt and to administer them pursuant to the provisions of the Bankruptcy Act and the orders of the court (Bankruptcy Act, sec. 47; 30 Stat. 557, ch. 541, sec. 47; 32 Stat. 799, ch. 487, sec. 10; 36 Stat. 840, ch. 412, sec. 8; 11 U. S. C. A. 75). [See App. p. iii.]

Subsection (a) of section 75 of the Bankruptcy Act provides, in part:

> "* * * every court of bankruptcy * * * shall appoint one or more referees to be known as 'conciliation commissioners'."

General Order L of the Supreme Court of the United States, section 11 (288 U. S. 623), provides as follows:

> "In so far as is consistent with the provisions of section 75 of this general order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section. A supervisory conciliation commissioner, if appointed, shall exercise such supervision and control over the conduct of proceedings by conciliation commissioners as the judge may from time to time direct."

It is clear that, under the statute and under the General Orders of the Supreme Court, the Conciliation Commissioner is a referee in bankruptcy and the limit of his authority is the authority vested in a referee in bankruptcy by the Bankruptcy Act itself and by the General Orders of the Supreme Court and the rules of the United States District Court for the Southern District of California.

The word "jurisdiction" has a definite meaning in the law and is generally defined as "the authority or power which a man has to do justice in causes of complaint brought before him; the power and authority to declare the law". (35 *C. J.* 426.)

In the matter of *In re McMurray,* 8 Fed. Supp. 449, one of the questions before the court was whether or not the Conciliation Commissioner has power to hold real estate of the debtor for the purpose of administration. In that case the District Court for the Southern District of Iowa pointed out that the provisions in subsection (n) of section 75 giving the court jurisdiction of the farmer and his property has to do with the jurisdiction of the court *to declare the law and not with the possession or control of the property itself.*

See, also:

In re Wiedmer (C. C. A. 7), 82 Fed. (2d) 566.

At the time petitioner, as Conciliation Commissioner, took possession and sold the crops of the debtor and received and disbursed the proceeds he was not a trustee

in bankruptcy but was, under the provisions of the statute and the General Orders of the Supreme Court, a referee. As a referee in bankruptcy he had absolutely no authority to take possession and sell and disburse the proceeds of personal property of the bankrupt upon which respondent had a valid lien.

A trustee who is regularly appointed and qualified is accountable for his disbursement of the funds of the bankrupt's estate. (Bankruptcy Act, sec. 47; 30 Stat. 557.) He is only permitted to withdraw funds from the depositary upon the counter-signature of the judge or referee designated for that purpose. [General Order in Bankruptcy XXIX, App. p. vi.] If a trustee pays out funds without a proper order of court or pursuant to an order of court made without proper notice, he becomes personally liable therefor.

Re Rude, 101 Fed. 805;
Re Cadenas & Co., 178 Fed. 158;
Re Hoyt and Mitchell, 127 Fed. 968;
Re Howard, 130 Fed. 1004;
Re Schwartz, 4 Fed. (2d) 895;
Remington on Bankruptcy, secs. 1131, 1123.

A fortiori one who, without such appointment, usurps the functions and duties of a trustee should be held at least to the same degree of accountability.

The record shows that no notice of the disbursement of any of the funds was given to respondent or any creditor [O. R. p. 43; P. R. pp. 23, 24], and it is con-

ceded that no order was made authorizing petitioner to make the disbursements to Cuccia (Pet. Br. p. 26).

Petitioner argues, however, that the decision of the Circuit Court of Appeals was not based upon the lack of an order. This is not correct. One of the specifications of error urged upon the appeal was that no valid order authorizing any expenditure of money was ever made [O. R. p. 76; P. R. p. 45]. The Circuit Court in its opinion stated respondent's objections to the order settling the account as follows [O. R. p. 94; P. R. p. 60]:

> "Appellant objected to appellee's account, on the ground that appellant was entitled to the entire proceeds of the mortgaged crop, and that the disbursements made by appellee were made without appellant's knowledge or consent and were *unauthorized* and *improper*."

And, in stating its conclusion, the court said [O. R. p. 95; P. R. p. 61]:

> "Appellee therefore could not be and *was not authorized* or empowered to pay Cuccia, with appellant's money, for performing this obligation."

The record is clear that the petitioner, rather than confining his activities to the scope of his jurisdiction as a referee, usurped the functions of a trustee in bankruptcy, took possession of funds belonging to a secured creditor and paid them out without complying with the provisions of the Bankruptcy Act and General Orders in Bankruptcy and without securing any order of court and that he should, therefore, be personally liable as a trustee in bankruptcy would be under the same circumstances.

Point Four.

After Adjudication under Subsection (s) of Section 75 of the Bankruptcy Act the Conciliation Commissioner no Longer had Jurisdiction of the Proceedings for any Purpose.

There is one other angle to this case which affects only a portion of the money involved. After the debtor filed his petition under section 75 of the Bankruptcy Act the proceedings were referred to the petitioner as Conciliation Commissioner, the crops were sold and the proceeds received by him and a portion of them were disbursed. On January 7, 1935, the debtor filed an amended petition under subsection (s) of section 75 of the Bankruptcy Act and, after an adjudication, the proceedings were referred to D. W. Richards, referee in bankruptcy for San Bernardino county [O. R. p. 36; P. R. p. 19]. These proceedings were conducted prior to the 1935 amendment to subsection (s) of section 75, which provides that after the filing of an amended petition under subsection (s) the Conciliation Commissioner shall continue to act as referee until the case has finally been disposed of. Upon the filing of the amended petition on January 7, 1935, the petitioner, as Conciliation Commissioner, lost all jurisdiction of these proceedings, but, nevertheless, *continued thereafter to hold and disburse the money.* He testified at the hearing that he thought that he was named trustee [O. R. p. 39; P. R. p. 21], but the transcript of the

referee's docket [Creditor's Exhibit No. 1, O. R. pp. 34-38; P. R. pp. 18-20] does not show that any trustee was ever elected at a creditor's meeting. In fact the transcript shows that at the first meeting of creditors respondent objected to the jurisdiction of the court and made a motion to dismiss the proceedings, which was subsequently granted by the referee [O. R. p. 37; P. R. p. 19].

It is clear that after the jurisdiction of this case passed from the Conciliation Commissioner to the referee in bankruptcy there is no possible justification for the continued possession and disbursement of the money by the Conciliation Commissioner without a proper court order authorizing such disbursement.

Point Five.

Moneys for which Petitioner was Surcharged were not Expended in Labor Performed and Expenses Incurred in Cultivating and Harvesting the Mortgaged Crop.

The Circuit Court of Appeals stated in its opinion [O. R. p. 94; P. R. p. 60] that the account showed the sum of $1290.33 had been paid to Cuccia for labor performed and expenses incurred in cultivating and harvesting the mortgaged crop. This statement is not borne out by the record, as we will show, but apparently the Circuit Court was of the opinion that it was immaterial for what purpose the moneys had been disbursed. Petitioner, however, has seized upon this statement as a basis for all of his argument upon the fourth specification of error (Pet. Br. p. 27) and substantially all of the argument upon the fifth specification of error. The argument is, in brief, that the cost of creating the fund should be charged to it and that the proceeds of the sale of crops should be charged with the expense of production of those crops.

The record does not show that $1290.33 was expended in cultivating and harvesting the mortgaged crop. The account filed by petitioner [O. R. p. 17; P. R. p. 8] shows the receipt of $1437.37 on September 26, 1934. Petitioner's answer to the objections to the account [O. R. p. 26; P. R. p. 13] admits that the money was received from a sale of the crop of grapes harvested in September, 1934. It must be remembered that the petition was filed in August, 1934, and the grapes to be harvested in September were certainly in existence at the time of filing the petition.

The answer further alleges [O. R. p. 26; P. R. p. 13]:

> "That said Bank of America claims a crop mortgage upon said premises covering crops for the years 1934 and 1935 and for the protection of said premises and said crops it is absolutely necessary that *said vineyard* on said land be attended to and all the items paid for labor and living expenses of the debtor and feed for his horses were absolutely necessary to be paid *in order to have said vineyard properly attended to.* That the money paid to the debtor was no advancement for his personal benefit, but as pay for his work, and the amount advanced him for feed for his horses and living expense was less than the payment to him of ordinary wages for the work which he actually and necessarily performed in the care of the crop and *for the preservation of the vineyard and future crops thereon* for the benefit of creditors and lien claimed by said Bank of America thereon.
>
> That said debtor did not have any other means for his living expenses and therefore could not have performed said work without getting his feed."

The answer does not allege that any part of the proceeds of the crop were used in the cultivation or harvesting of the crop in September of 1934. Rather, it alleges that the money was used in the care of the *vineyard* on the land so that *future* crops might be obtained. Other than the one disbursement on September 26, 1934, of $340.00, which we will discuss separately, all of the money was paid out during a *period of nine months subsequent to the sale of the crop in September of 1934.* The 1934 crop having been *harvested and sold* in September, money disbursed after that date could not possibly have been ex-

pended in the cultivation or harvesting of *that crop,* and there is absolutely nothing in the record to indicate that it was. On the contrary, the record shows conclusively that the money was expended in the care of the *land,* payment of living expenses of the debtor, and costs and expenses of administration.

Expenses of administration are, by the terms of the statute, not chargeable to any creditor. Subsection (b) of section 75 provides, in part:

> "No fees, costs or other charges shall be charged or taxed to any farmer or his creditors by any conciliation commissioner or with respect to any proceeding under this section, except as hereinbefore in this section provided." (47 Stat. 1471, 11 U. S. C. A. 203.)

The item of $340.00 above referred to was disbursed on September 26, 1934. The explanation in the account is as follows [O. R. p. 17; P. R. p. 8]:

> "Cash, labor, for 20 men on ranch
> Court order issued $340.00."

The petitioner testified on direct examination [O. R. p. 39; P. R. p. 21] that he paid the money to Cuccia and directed him to pay the others. On cross-examination by the judge he said that he paid for the picking of the grapes $403.00 [O. R. p. 48; P. R. p. 26]. This is the only testimony in the entire record indicating that any part of the money received from the sale of the crop was used to pay the expense of harvesting the crop.

The Circuit Court of Appeals based its decision upon the provisions of the crop mortgage. This mortgage provides, as heretofore pointed out (*ante*, p. 11) that the mortgagor shall harvest and prepare the crop for market and then deliver the crop to the mortgagee. As stated by the Circuit Court [O. R. p. 95; P. R. p. 61]:

> "Appellant (respondent) was under no obligation to cultivate or harvest the crop or to pay Cuccia for doing so. *Cuccia was expressly obligated to do these things himself, at his own expense.* No conciliation commissioner, trustee, referee, judge or court could impose this obligation on appellant. Appellee, therefore, could not be and was not authorized or empowered to pay Cuccia, with appellant's money, for performing this obligation. What appellee could or should have done had Cuccia failed to perform this obligation it is unnecessary to decide, since there was, in fact, no such failure." (Italics ours.)

The petitioner did not himself contract for and pay the items represented by the $340.00 payment, but the obligations were incurred by Cuccia and the money paid to him. As far as Cuccia was concerned, it was his obligation to harvest the crop. There is no justification for the use of funds belonging to the crop mortgagee to satisfy an indebtedness incurred by the bankrupt after the filing of the petition.

Petitioner argues in his fourth specification of error that the disbursements made were to *produce* the crop and therefore should have been deducted from the proceeds of the sale and cites cases to the effect that expenses

incurred in creating a fund should ordinarily be paid out of the fund.

We have pointed out that the disbursements, with a possible exception of $340.00, were not made in the cultivation or harvesting of the crop because they were made after the crop was harvested and sold. The cases cited by petitioner are not comparable to the facts of the present case. The situation here is more nearly a sale free of liens by a trustee in bankruptcy. The petitioner, usurping the functions of a trustee, took possession of specific personal property subject to a valid lien and sold it, receiving the proceeds into his possession. The debt secured was $4934.68 after the sale of the *real* property [O. R. p. 22; P. R. p. 11] and the crop itself was, of course, worth much less than the amount of the debt.

The rule is well established that when a trustee in bankruptcy takes possession of property subject to a valid lien and sells the same free of liens without the assent of the secured creditor the creditor is entitled to full payment of the debt, without deduction of any costs, expenses, fees or commissions.

Re Harralson (C. C. A. 8), 179 Fed. 490;

Re Holmes Lumber Co., 189 Fed. 178, 181;

Re Cutler & John, 228 Fed. 771, 773;

Re Plantations Co., 270 Fed. 273;

Re Westmoreland, 4 Fed. (2d) 602;

Robertson v. Goree (C. C. A. 5), 29 Fed. (2d) 261.

Point Six.

The Provisions of Section 75 of the Bankruptcy Act do not Permit of the Appropriation of a Portion of the Security of any Creditor for the Benefit of the Bankrupt or Other Creditors.

Under Point One of our argument we urged that the facts of this case do not involve an interpretation of subsection (s) of section 75 of the Bankruptcy Act as amended August 28, 1935 (49 Stat. 942-945), for the reason that the facts under which the case arose occurred prior to its enactment. Petitioner's fifth specification of error and the one apparently upon which he principally relies is directed entirely to this amended statute and, in the event that the court should consider the point, we feel that we should address some argument in reply.

The substance of petitioner's argument is that proceedings under subsection (s) of section 75 are analogous to receivership proceedings, that a receiver operating a going concern is permitted to divert revenue from operations to pay operating expenses and that, therefore, a farmer operating his farm should be entitled to take proceeds of crops subject to a crop mortgage to pay for the operation of the farm. Petitioner makes the further startling statement that every conciliation commissioner in the state, when confronted with a crop mortgage has been obliged to "appropriate" at least a portion of the proceeds of the sale of the crops to pay the expense of its production.

As we have pointed out, *in this case,* the money was not disbursed in the cultivation of the crop and the argument does not apply.

As an abstract proposition, however, petitioner's argument is not sound. It may be, as petitioner asserts, that

in a given case a farmer would be unable to obtain relief under the statute by reason of the fact that the crops being mortgaged he would be unable to obtain funds to operate the property. That, however, appears to be a matter to be addressed to the discretion of the Congress. This court is concerned only with an interpretation of the statute as it now exists.

One of the principal objections to the original subsection (s) of section 75 was that it took away the right of the mortgagee to retain his lien until the indebtedness was paid in full. In *Wright v. Vinton Branch Mountain Trust Bank,* 300 U. S. 440, 81 L. Ed. 736, 57 S. Ct. 736, this court held that this objection to the original statute had been removed by the amended statute. The court said (p. 458):

> "Third. It is not denied that the new act adequately preserves three of the five above-enumerated rights of a mortgagee. 'The right to retain the lien until the indebtedness thereby secured is paid' is specifically covered by the provisions in paragraph 1, that the debtor's possession, 'under the supervision and control of the court,' shall be 'subject to all existing mortgages, liens, pledges, or encumbrances,' and that:
>
> 'All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.'"

Under this section of the statute there appears to be no room for argument. A creditor holding a mortgage upon a growing crop has a lien upon specific property.

If that property is sold the lien would attach to the proceeds. The statute says that such an existing lien shall remain in *full force and effect* and the property covered by such lien shall be *subject to the payment of the claim of the secured creditor.* When the property has been reduced to money what can be done except apply the money upon the debt? Would the money be held "subject to the payment of the claim" if it was expended to meet other obligations of the debtor? Does the statute contemplate that the debtor be allowed to remain in possession of the *money* and pay rental therefor? Obviously not. The provision that the property shall be subject to the *payment* of the claim can only mean that when the property had been liquidated the secured claim shall be paid.

Petitioner argues that this court, in the *Wright* case, approved the provisions of the statute authorizing the debtor to remain in possession of his property and requiring the payment of rental. The argument does not fit the facts. No purpose would be served by allowing the debtor to remain in possession of a crop of grapes, nor would any reasonable person suggest that the debtor should pay any rental for such possession. The provisions of the statute for possession and payment of rental clearly do not apply to crops after they are harvested.

A further argument of petitioner is that the proceeds of the crop should be used to pay for the expense of the production of the crop. The argument does not bear analysis. Suppose the debtor mortgaged his crop for $1000.00 and then filed a proceeding under section 75 of the Bankruptcy Act. Thereafter suppose that it should be necessary to borrow or incur debts of an additional $1000.00 in order to produce and harvest the crop, which ultimately sold for $1000.00. If petitioner's theory is

correct, then the indebtedness created *after* the filing of the bankruptcy proceeding, even though it did not *purport* to be secured by a lien upon any specific property, would be paid out of the proceeds of the sale of specific mortgaged property before payment of the mortgage.

There is no reason or authority for such a proposition. Even though the subsequent loans were *actually secured* by a mortgage upon the crops the original mortgage would have a prior lien. The universal rule is that liens upon the same property have priority according to the time of their creation. In the State of California the rule is stated in section 2897 of the Civil Code as follows:

> "2897. Priority of liens. Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia."

Petitioner concedes that his argument cannot be sustained under any theory of bankruptcy practice or any provision of the Bankruptcy Act other than section 75. It must also be conceded that there is no express provision in section 75 which would authorize the appropriation of any part of the proceeds of the sale of mortgaged property prior to payment in full of the debt secured thereby. Petitioner does not claim the right by reason of anything in the statute, but contends that because a proceeding under section 75 is *similar* to a receivership to the extent that it seeks to restrain enforcement of liens to give the farmer an opportunity to rehabilitate himself, the farmer, as his own receiver, should have the rights and powers of an equity receiver.

It would appear that regardless of the similarity of *purpose*, the powers, rights and duties of a farmer and his creditors under section 75 must be determined by the provisions of the statute under which the proceedings are pending. But assuming for the purpose of argument that a farmer debtor was vested with the powers of an equity receiver, the petitioner's contention would still be unsound. Petitioner has not cited any authority holding that a receiver may sell specific property, which is subject to the lien of a mortgage, and apply the proceeds of the sale to anything except payment of the debt secured thereby. No such authority exists. A receiver, as a trustee in bankruptcy, takes the property *subject to existing liens* (*Clark on Receivers,* Vol. I, sec. 269). It is true that under certain circumstances a receiver may, by order of court, create liens which will have priority over existing liens, but the court in which the proceedings are pending does not have general authority to displace existing liens (*Kneeland v. American Loan and Trust Co.,* 136 U. S. 89, 34 L. Ed. 379, 10 S. Ct. 950; *Clark on Receivers,* Vol. I, sec. 477). Such liens can only be created upon order of court after notice to lienholders (*Lockport Felt Co. v. United Box etc, Co.,* 74 N. J. Eq. 686, 70 Atl. 980; *Quincy etc. R. Co. v. Humphreys,* 145 U. S. 82, 36 L. Ed. 632, 12 S. Ct. 787; *Clark on Receivers,* Vol. I, sec. 477a).

We believe that upon reason and authority there is absolutely no basis to support petitioner's contention that a farmer after filing a petition under section 75 of the Bankruptcy Act should be permitted to disregard a valid crop mortage executed prior to bankruptcy and to use the words of petitioner, "appropriate" a portion of the proceeds of the sale of the security.

Conclusion.

We respectfully urge that for the reasons and upon the authorities herein cited the decision of the Circuit Court of Appeals is a correct statement of the law applicable to the facts of the case and that it should be affirmed.

Respectfully submitted,

WILLIAM C. DAY,
Counsel for Respondent.

LOUIS FERRARI,
EDMUND NELSON,
HUGO A. STEINMEYER,
Of Counsel.

APPENDIX.

Bankruptcy Act of 1898.

Sec. 38. Jurisdiction of Referees.—(a) Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) during the examination of the bankrupt, or other proceedings, authorize the employment of stenographers for reporting and transcribing the proceedings at such reasonable expense to the estate as the court may fix. (July 1, 1898, 30 Stat. at L. 555, ch. 541, sec. 38; May 27, 1926, 44 Stat. at L. 662, ch. 406, sec. 12 (U. S. Code, title 11, sec. 66).)

Sec. 39. Duties of Referees.—(a) Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estate in process of administration before them as may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerk the records, herein required to be kept by them. when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them, when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

(b) Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practice as attorneys and counselors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy. (July 1, 1898, 30 Stat. at L. 555, ch. 541, sec. 39 (U. S. Code, title 11, sec. 67).)

Sec. 47. Duties of Trustees.—(a) Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied (as amended June 25, 1910); (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and

file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

(b) Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

(c) The trustee shall, within thirty days after the adjudication, file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owns real estate not exempt from execution, and pay the fee for such filing, and he shall receive a compensation of fifty cents for each copy so filed, which, together with the filing fee, shall be paid out of the estate of the bankrupt as a part of the cost and disbursements of the proceedings. (July 1, 1898, 30 Stat. at L. 557, ch. 541, sec. 47; Feb. 5, 1903, 32 Stat. at L. 799, ch. 487, sec. 10; June 25, 1910, 36 Stat. at L. 840, ch. 412, sec. 8 (U. S. Code, title 11, sec. 75).)

Sec. 57. Proof and Allowance of Claims.—(h) The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such se-

curities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. (July 1, 1898, 30 Stat. at L. 544, ch. 541, sec. 57; Feb. 5, 1903, 32 Stat at L. 797, ch. 487, sec. 12; May 27, 1926, 44 Stat. at L. 662, ch. 406, sec. 13 (U. S. Code, title 11, sec. 93).)

General Orders In Bankruptcy.

Adopted and Established by the Supreme Court of the United States November 28, 1898, as Amended April 17, 1933

Supreme Court of the United States.

XII.

Duties of Referee.

1. The order referring a case to a referee shall name a day upon which the bankrupt or debtor shall attend before the referee, and from that day the bankrupt or debtor shall be subject to the orders of the court in all matters relating to the proceedings, and may receive from the referee a protection against arrest to continue, unless suspended or vacated by order of the court, until the final adjudication on his application for a discharge or for the confirmation of a composition or extension proposal. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all the proceedings, except such as are required by the Act or by these general orders to be had before the judge, shall be had before the referee.

XXIX.

Payment of Moneys Deposited.

No moneys deposited as required by the Act shall be drawn from the depository unless by check or warrant, signed by the clerk of the court, or by a trustee, and countersigned by the judge of the court, or by a referee designated for that purpose, or by the clerk or his assistant under an order made by the judge, stating the date, the sum, and the account for which it is drawn; and an entry of the substance of such check or warrant, with the date thereof, the sum drawn for, and the account for which it is drawn, shall be forthwith made in a book kept for that purpose by the trustee or his clerk; and all checks and drafts shall be entered in the order of time in which they are drawn, and shall be numbered in the case of each estate. A copy of this general order shall be furnished to the depository, and also the name of any referee or clerk authorized to countersign said checks. This general order shall not apply to proceedings under section 77 of the Act.

P. 2

SUPREME COURT OF THE UNITED STATES.

No. 365.—October Term, 1937.

Noah Adair, Petitioner, *vs.* Bank of America National Trust and Savings Association.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 28, 1938.]

Mr. Justice Reed delivered the opinion of the Court.

This writ was asked to review a decree of the Circuit Court of Appeals for the Ninth Circuit, upholding the objections and exceptions of the respondent, a creditor, to the final account of petitioner, a conciliation commissioner appointed under Section 75 (a) of the Bankruptcy Act, and reversing the order of the District Court which had settled and allowed the account. The Circuit Court of Appeals held that the petitioner should have been required to pay to respondent the gross proceeds of the grape crop harvested on the debtor's land after the debtor had filed his petition under Section 75 of the Bankruptcy Act, without any deduction for moneys spent in harvesting that crop and for other purposes, because of the fact that the crop was subject to a chattel mortgage held by respondent. 90 F. (2d) 750. In view of the importance of the question with respect to proceedings instituted under Section 75 of the Bankruptcy Act, this Court granted certiorari, — U. S —.

On August 6, 1934, Andrea Cuccia, a farmer, filed an adequate petition under Section 75 (a) to (r) of the Bankruptcy Act, showing by the schedules secured claims to respondent of over $12,000 and unsecured claims of a slightly larger amount, and expressing his desire to effect a composition or extension of time to pay his debts. His petition was referred to Noah Adair, the Conciliation Commissioner for the County of San Bernardino, California. On January 7, 1935, an amended petition was filed by the debtor, stating that he had failed to obtain the approval of his creditors to a composition or extension proposal and praying that he might be adjudged a bankrupt under the provisions of Section 75, subsection (s) of the Bankruptcy Act, as enacted June 28, 1934. Adjudication was entered and the pro-

ceedings referred to the Referee in Bankruptcy. On October 14, 1935, the District Court, on a motion by the respondent, dismissed the petition. On March 16, 1936, the debtor attempted to invoke the benefits of the amended Section 75(s), but we are not here concerned with that petition and the subsequent proceedings (set out in *Bank of America National Trust & Savings Ass'n* v. *Cuccia*, decided December 30, 1937, on rehearing, by the Circuit Court of Appeals for the Ninth Circuit).

The respondent, at the beginning of and throughout the proceedings, held a matured note of the debtor and his wife, secured by a deed of trust on certain lands in the County of San Bernardino, California, and by a mortgage on the crops growing or to be grown on the same lands, during 1933 and 1934, or prior to the payment in full of the total indebtedness. The crop mortgage required the mortgagor to cultivate, harvest and deliver the crop to the mortgagee, without cost to the mortgagee, for sale and application of the proceeds to the debt.

The present controversy had its origin in the respondent's petition to the Court, on February 6, 1936, for an accounting by the conciliation commissioner of funds realized from crops sold off the debtor's premises in 1934. In response to the order of the District Court, the conciliation commissioner made an accounting as appears in the footnote.[1] The Bank objected to the account on

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[1] Account—Filed February 17, 1936

September 26, 1934—An account in the name of Andrea Cuccia and Noah Adair was opened with the American National Bank, San Bernardino, California, and a deposit of $1437.37 was made	$1,437.37
September 26, 1934—Cash, labor, for 20 men on ranch Court Order issued*	340.00
October 1, 1934—Andrea Cuccia	59.33
October 30, 1934—Andrea Cuccia, 14 days labor Court order issued	42.00
November 27, 1934—Andrew Cuccia, $15. living expense $20. filing fee under 75(s) and $20. feed for horse. Court order	55.00
December 20, 1934—Andrea Cuccia, $10. feed for horse and $10. living expense	20.00
January 22, 1935—Andrea Cuccia, $20. and labor on grove $144.00	164.00
[fol. 18] January 22, 1935—D. W. Richards indemnity fee under Section 75(s)	18.25
February 1, 1935—Andrea Cuccia, labor, 8 men, 11 days each	264.00
February 15, 1935—Andrea Cuccia labor	90.00
March 15, 1935—Andrea Cuccia, $45. labor; $20. hay and $10. living expense	75.00
April 19, 1935—Jos. E. Rich, Court Reporter	22.50
April 19, 1935—Ralph W. Eckhardt, attorneys fee	50.00
April 19, 1935—Andrea Cuccia, 37 days work of hired men	111.00
May 11, 1935—Andrea Cuccia, sulphur for grapes	60.00
June 1, 1935—Andrea Cuccia, labor for two man working in grapes	30.00
Total	$1,401.08
Tax, etc.	.60
	$1,401.68

Balance in bank to date, $35.69.

*[The "court order" refers to an order entered by petitioner himself. The only order entered by the District Court as to these expenditures was its order of approval of the account filed by petitioner.]

the ground that the money was the proceeds of the sale of a crop covered by the chattel mortgage above referred to and that the disbursements from the fund were made without valid order by the District Court and without the Bank's notice or knowledge of any court order. It was further objected that after adjudication in bankruptcy under Section 75(s) the conciliation commissioner had no jurisdiction. Petitioner stated in his answer and testimony that the items appearing prior to the adjudication in bankruptcy of January 7, 1935, were disbursed, on his orders as conciliation commissioner, either to gather the 1934 crop or to provide for care of the property, and that the items appearing from January 22 through June 1, 1935, were disbursed under the direction of the referee in bankruptcy. The District Court, finding that the expenditures of the conciliation commissioner were made in good faith and for the purpose of conserving the estate, settled and allowed the account. The Circuit Court of Appeals directed the disallowance of the account and the payment by the conciliation commissioner to the respondent of the gross proceeds of the mortgaged crop.

First. The powers granted by the bankruptcy clause of the Constitution, Article 1, § 8, cl. 4, are not limited to the bankruptcy law and practice in force in England or the States at the time of its adoption. *Continental Illinois Nat'l Bank and Trust Co.* v. *Chicago, Rock Island and Pacific Ry. Co.*, 294 U. S. 648, 668. Then the interests of the creditor alone were protected. Progressive liberalization of bankruptcy and insolvency laws, in an effort to avert the evils of liquidation, has furnished opportunity for composition in bankruptcy proceedings and later for composition and extension of debts in relief proceedings for individual debtors, for reorganization of railroads and other corporations, and for public debtor proceedings.[2]

Section 75 of the Bankruptcy Act[3] provides similar opportunities for the rehabilitation of farmers. *Wright* v. *Vinton Branch,*

[2] Bankruptcy Act of 1867, as amended by the Act of 1874, c. 390, § 17, 18 Stat. 178, 182; Act of March 3, 1933, c. 204, 47 Stat. 1467; Act of June 7, 1934, c. 424, 48 Stat. 911; Act of June 28, 1934, c. 869, 48 Stat. 1289; Act of April 10, 1936, c. 186, 49 Stat. 1198; Act of April 11, 1936, c. 216, 49 Stat. 1203, Act of August 16, 1937.

[3] Subsections (a) to (r) were added by the Act of March 3, 1933, c. 204, § 31, 47 Stat. 1470-1473, and subsections (a) and (b) amended by the Act of June 7, 1934, c. 424, §§ 8 and 9, 48 Stat. 911, 925. Subsection (s), the first Frazier-Lemke Act, was added June 28, 1934, c. 869, 48 Stat. 1289. Subsequent to the decision in Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, various subsections, including (s), were amended by the new Frazier-Lemke Act, August 28, 1935, c. 792, 49 Stat. 942.

300 U. S. 440, 456. It is sought to accomplish this rehabilitation through composition or extension of debts, subsections (e) to (l). On failure of composition and extension, further opportunity for rehabilitation is afforded the debtor, through provisions enabling him to retain possession of his property, under conditions favorable to its ultimate redemption by him. These steps are carried out under judicial supervision, subsection (s).[4]

To accomplish its purpose, Section 75 provides that the filing of a petition shall effect a stay.[5] Such a stay under judicial discretion as to enforcement of claims does not take property without due process and is constitutional. *Continental Illinois Nat'l Bank and*

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[4] Subsection (s) in effect at the institution of this proceeding for the relief of a debtor was held unconstitutional in Louisville Joint Stock Land Bank *v.* Radford, 295 U. S. 555. The new subsection (s) was approved in Wright *v.* Vinton Branch, 300 U. S. 440.

[5] Subsection (o) of Sec. 75 (which has never been amended) provides:

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

"(1) Proceedings for any demand, debt, or account, including any money demand;

"(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

"(3) Proceedings to acquire title to land by virtue of any tax sale;

"(4) Proceedings by way of execution, attachment, or garnishment;

"(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

[6] These subsections, as originally enacted, read:

"(e) . . . After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors."

"(n) The filing of a petition pleading for relief under this section, shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

Subsection (e) has never been amended. Subsection (n) was amended, in respects not material here, by the Act of August 28, 1935, c. 792, 49 Stat. 942.

Trust Co. v. *Chicago, Rock Island and Pacific Ry. Co., supra,* at pages 675 *et seq.* and 680 *et seq.; Wright* v. *Vinton Branch, supra,* 460; *Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398. In order to operate and protect the property during the stay, and pending confirmation or other disposition of the composition or extension proposal, the statute provides in subsections (e) and (n)* for the exercise by the court of "such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors." These provisions look toward the maintenance of the farm as a going concern, and afford clear authority, in a proper case, for the continuance of the operations of the farm after the filing of a petition under Section 75 of the Bankruptcy Act.

Second. In holding the conciliation commissioner personally liable, we think the lower court misconceived the nature of his office. At the time of filing the original petition for composition and extension, August 6, 1934, Section 75 of the Bankruptcy Act was comprised of subsections (a) to (s) inclusive. Subsections (a) to (r) made provision for conciliation commissioners, set up the same qualifications for eligibility to this office as are required for the office of referee, authorized the conciliation commissioners to receive and transmit the petitions and schedules, to call the first meeting of creditors, with notice of terms of composition or extension, to hear the parties in interest, to prepare final inventory, to supervise the farmer's affairs during an extension period and to distribute the consideration after a composition. In accordance with Section 75, subsection (b), this Court, as of April 24, 1933, established Rule L, governing proceedings under Section 75, (a) to (r) inclusive, as an addition to the General Orders in Bankruptcy, 288 U. S. at 641. Rule L provided for reference to the conciliation commissioner, and his carrying out of the duties outlined above. The commissioner was given, in so far as consistent with Section 75 and Rule L, "all the powers and duties of a referee in bankruptcy," to be carried out under the General Orders in Bankruptcy. Rule L (11). Sections 38 and 39 of the Bankruptcy Act and subsections 3 and 6 of Rule L indicate the wide extent of the authority of the conciliation commissioner. Under Section 38, Bankruptcy Act, clause four, the referee is empowered to "perform such part of the duties, except as to questions arising out of the applications

of bankrupts for compositions or discharges as are by this Act conferred on courts of bankruptcy . . . "[7]

In view of the foregoing the conciliation commissioner had the authority, prior to the adjudication of bankruptcy under Section 75(s), to act as the "court", in the first instance and subject to review, in controlling the property of the debtor "in the best interests of the farmer and his creditors." Sec. 75 (e). *In re Wiedmer,* 82 F. (2d) 566. Under this authority the conciliation commissioner acted in authorizing the expenditures shown on the account for gathering the crop of 1934, preparing for the crop of 1935, and paying fees and expenses. It is plain that the conciliation commissioner, like the referee (*White* v. *Schloerb,* 178 U. S. 542, 546; *Mueller* v. *Nugent,* 184 U. S. 1, 13) exercises some of the "judicial authority" of the bankruptcy court. The acts just detailed were judicial acts. Error within his jurisdiction does not subject him to personal liability. *Randall* v. *Brigham,* 7 Wall. 523, 535. See also *Bradley* v. *Fisher,* 13 Wall. 335; *Alzua* v. *Johnson,* 231 U. S. 106; *Yaselli* v. *Goff,* 275 U. S. 503. Cf. *First Nat'l Bank of Ardmore* v. *Bonner,* 74 F. (2d) 139, 142; *United States* v. *Ward,* 257 Fed. 372, 377. This doctrine is quite clear when, as here, no rule or positive enactment was violated and the acts were bona fide.

The fact that the proceeds of the crop were banked to the joint account of the debtor and the conciliation commissioner may have obscured the judicial character of the latter. Better practice would suggest that the account appear in the name of the debtor, with the counter-signature of the conciliation commissioner required for withdrawals. Also, at an early, preferably the first, meeting of creditors, the method of handling the business of the debtor pending confirmation or further order should have been developed and proper orders entered. Cf. Section 12 (a), Bankruptcy Act. This

[7] "Applications of bankrupts for compositions", as used in this clause, does not refer to proceedings of debtor for rehabilitation under Section 75. And even under Section 12, the referee has authority to proceed with steps preliminary to the application for confirmation of the composition proposal. Cf. General Order XII, paragraph 3; In re Bloodworth-Stembridge Co., 178 Fed. 372.

Rule 77 of the District Court for the Southern District of California reads as follows: "Rule 77.—Jurisdiction of Referees. It is ordered that the Referees in Bankruptcy of said Court be, and they are hereby vested with jurisdiction in all bankruptcy cases within the limits of their respective counties, to perform all the duties conferred on Courts of Bankruptcy, which Referees may be required or authorized to perform; except as otherwise provided by General Order in Bankruptcy No. XII."

does not appear to have been done. These irregularities do not suffice to withdraw from the conciliation commissioner his judicial protection. *Alzua* v. *Johnson,* 231 U. S. 106.

Some disbursements were made after the adjudication in bankruptcy under subsection (s) and the reference of the proceedings to a referee in bankruptcy. It is unnecessary to decide whether, under Section 75(s) as originally enacted, the conciliation commissioner could have continued to act as referee. In this case, there was no further reference of the proceedings to petitioner, and he continued to act solely at the direction of the referee in bankruptcy. His uncontradicted testimony was as follows:

"When this matter was referred to D. W. Richards, as referee I wanted him to take the money I had on hand and become the custodian of it. He asked me to keep the money and said he would trust me in the expenditure of the money while it was under him and that he would O. K. the checks, so all the checks that were written after it went to D. W. Richards were O. K.'d by him and I wrote the checks at his request."

Without determining the effect of the unconstitutionality of subsection (s) upon the steps taken under its authority, it appears that the petitioner acted either judicially, continuing to exercise his powers as conciliation commissioner, or ministerially, as an arm of the court, under the direction and with the approval of the referee. Under the facts of this case we do not think petitioner is personally liable for these disbursements. Cf. *First Nat'l Bank of Ardmore* v. *Bonner,* 74 F. (2d) 139, 142.

Third. Moreover, the expenditures assailed by respondent were proper, at least with respect to the principal items (which are the only ones we shall consider)—the amounts spent in harvesting the 1934 crop, which was sold in order to create the fund, and the amounts spent for preservation of the vineyard and for the cultivation of the 1935 crop. There is no showing that petitioner was improvident. Reference is made in his account to money paid to the farmer as "living expenses", but the record discloses that the amounts paid the debtor did not exceed the ordinary wages for the work he actually and necessarily performed in the maintenance of the vineyard. Compare *Wright* v. *Vinton Branch, supra,* 300 U. S. at 466; *In re Barrow,* 98 Fed. 582.

The court below ruled that under the crop mortgage the farmer had the obligation to cultivate and harvest the crop at his own ex-

pense, and therefore the gross proceeds belonged to respondent. This conclusion disregards the fact that the debtor did not harvest the grapes as an ordinary mortgagor. He had come into court seeking relief under Section 75 of the Bankruptcy Act. The filing of his petition put the property in the control of the court and the harvesting of the crop and the preservation of the property became a matter for the concern and action of the court.

Respondent certainly cannot complain of the devotion of the proceeds of the 1934 crop to the cost of harvesting that crop. The care and harvesting of that crop represented the only way to preserve its worth (cf. *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 455), and the cost of protecting a fund in court is everywhere recognized as a dominant charge on that fund. See *Bronson* v. *La Crosse R. Co.*, 1 Wall. 405, 410; *Shepherd* v. *Pepper*, 133 U. S. 626, 652; *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 287, 293; *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, 376; *Wright* v. *Vinton Branch, supra*, 300 U. S. at 468. The rule applies even in ordinary bankruptcy proceedings[8] since the secured creditor benefits from the disbursement.[9]

And since the creditor in this case had a lien on the crop for future years and on the real estate, we cannot say that the money expended for maintenance of the real estate and toward production of the 1935 crop was not likewise for its benefit. Compare *Wright* v. *Vinton Branch, supra*, 300 U. S. at 468.[10] Respondent itself has

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[8] Though the court orders a sale free of liens without the consent of the lienholder, the cost of preserving the property is deducted before the proceeds are turned over to him. Norton Jewelry Co. *v.* Hinds, 245 Fed. 341, 343; In re N. Y. & Phila. Package Co., 225 Fed. 219, 224; In re Hansen & Birch, 292 Fed. 898, 899; In re Westmoreland, 4 F. (2d) 602, 603; In re Prince & Walker, 131 Fed. 546, 551; In re Davis, 155 Fed. 671, 673.

[9] See Virginia Securities Corp. *v.* Patrick Orchards, 20 F. (2d) 78, 81; Norton Jewelry Co. *v.* Hinds, 245 Fed. 341, 343; In re Prince & Walker, 131 Fed. 541, 546.

[10] The Court said:

"(c) The disposition of the rental required to be made is said to involve denial of the mortgagee's rights. Paragraph 2 provides:

"'Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear.'

"It is suggested that payment of taxes and keeping the property in repair takes the income from the mortgagee, and that the mortgagor alone may be benefited thereby; that if the mortgagor exercises the option to purchase the property at its appraised value, he will secure the property free of tax liens which otherwise might have accrued against it. But it must be assumed that

suggested, in another connection (see *Bank of America National Trust & Savings Ass'n* v. *Cuccia, supra*), that the grape vines require "cultivation, pruning and care", lest they "deteriorate." It is unnecessary to determine the effect of an expenditure of the proceeds of a crop where the mortgagee has no lien on the property preserved and protected by the expenditures.

The decree is reversed and the cause remanded for further proceedings in conformity with this opinion.

It is so ordered.

Mr. Justice McREYNOLDS concurs in the result.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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the mortgagor will not get the property for less than its actual value. The Act provides that upon the creditor's request the property must be reappraised, or sold at public auction; and the mortgagee may by bidding at such sale fully protect his interest. Non-payment of taxes may imperil the title. Payments for upkeep are essential to the preservation of the property. These payments prescribed by the Act are in accordance with the common practice in foreclosure proceedings where the property is in the hands of receivers."